TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 249

LIVINGSTON H. McCREA, PETITIONER,

vs.

THE UNITED STATES OF AMERICA, AS OWNER OF THE S. S. "AMERICAN SHIPPER", ENGINES, TACKLE, APPARATUS, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI FILED AUGUST 3, 1934.

CERTIORARI GRANTED OCTOBER 8, 1934.

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IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

LIVINGSTON H. MCCREA, Libellant,

against

UNITED STATES OF AMERICA, as Owner of the Steamship "American Shipper", Her Engines, Tackle, Apparatus, etc., Respondent

DOCKET ENTRIES

July 11, 1928—Filed Libel.

Aug. 6, 1928—Filed Answer.

Aug. 26, 1928—Order for Commission to London, England entered.

Sept. 19, 1928—Note of Issue filed.

May 6, 1929—Filed Commission from London, England.

Oct. 2, 1931—Stipulation and Order, substituting John M. Scoble as attorney for Libellant, in place of Gilbert E. Roe, deceased, filed.

May 6, 1932—Trial before John C. Knox, Judge.

July 27, 1932—Opinion No. 7293 filed.

Aug. 12, 1932—Final Decree signed.

[fol. 2] Aug. 13, 1932—Application for Rehearing.

Aug. 15, 1932—Final Decree filed.

Aug. 30, 1932—Memorandum No. 7335 filed. Rehearing granted.

Feb. 10, 1933—Filed Opinion No. 7635.

Mar. 9, 1933—Final Decree filed. J. Knox.

Mar. 16, 1933—Notice of Appeal filed. Petition for Appeal filed. Order Allowing an Appeal filed. Assignment of Errors filed.

May 18, 1933—Citation on Appeal filed.

July 18, 1933—Motion to Amend and Resettle Final Decree.

July 18, 1933—Order or Decree Amending Final Decree signed.

July 19, 1933—Order or Decree Amending Final Decree filed.

Aug. 10, 1933—Notice of Appeal from Amended Order or Decree filed.

Aug. 10, 1933—Assignments of Error filed.
Aug. 10, 1933—Petition for Leave to Appeal from Amended Order or Decree filed.
Aug. 10, 1933—Order Allowing Appeal signed and filed.
Aug. 10, 1933—Citation issued.
Aug. 16, 1933—Citation filed.

[fol. 3] In United States District Court, Southern District of New York

[Title omitted]

Libel

To the Honorable Judges of the United States District Court for the Southern District of New York:

The libel and complaint of Livingston H. McCrea, in a cause of action civil and maritime, for wages, and penalties, against the United States of America, as owner of the Steamship "American Shipper," her engines, tackle, apparatus, etc., alleges:

Action under special rule for seamen to sue without security or prepayment of fees for the enforcement of the laws of the United States common and statutory for the protection of the health and safety of seamen at sea.

First: That your Libellant is a citizen of the United States and a resident of the City of Ithaca, Tompkins County, State of New York.

[fol. 4] Second: That the Respondent, United States of America is and at all times hereinafter mentioned was a sovereign state.

Third: That the Respondent, United States of America at all times hereinafter mentioned was and now is the owner and operator of the steamship "American Shipper," employed by said Respondent as a merchant vessel, engaged in the common carriage of goods by sea for hire. That said ship "American Shipper" is within the port of New York, Southern District of New York, and is about to proceed to sea.

Fourth: That at all the times hereinafter mentioned your Libellant was a fireman and/or seaman, and this is an action in his name, for his benefit, for wages, and to enforce laws made for his health and safety, and for the health and safety of other seamen and the public.

Fifth: That Libellant elects to have this suit proceed in accordance with the principles applicable to libel in personam pursuant to the Acts of Congress, approved March 9th, 1920, entitled, "An Act Authorizing Suits Against the United States in Admiralty; Suits for Salvage Services, Providing for the Release of Merchant Vessels belonging to the United States from Arrest and Attachment in Foreign Jurisdiction and for other Purposes."

Sixth: That at all the times hereinafter mentioned, the said vessel, "American Shipper," was of more than one [fol. 5] hundred (100) tons gross burden, and that said vessel made a voyage by sea from the Port of New York, State of New York, to the Port of London, Kingdom of Great Britain. That said vessel during said time was not a fishing or whaling vessel or yacht, but, on the contrary, carried merchandise consigned to and shipped by private parties from said Port of New York to said port of London, in the Kingdom of Great Britain.

Seventh: That on or about the 15th day of February, 1928, at said port of New York, said Libellant was hired by the Respondent to serve as a fireman on said vessel "American Shipper," on the voyage from said port of New York, State of New York, to the Port of London, Kingdom of Great Britain, and return to said Port of New York, State of New York, in the United States of America for final discharge, at wages of $65.00 per month; and in pursuance of such hiring, your Libellant signed Articles for said voyage before the United States Shipping Commissioner for the Port of New York, and proceeded on board of said vessel on said voyage hereinafter mentioned from said Port of New York to said Port of London, Kingdom of Great Britain, being a part of the voyage for which said Libellant so signed shipping articles.

Eighth: That said vessel, "American Shipper", carried only ten able seamen and two ordinary seamen on its said [fol. 6] voyage from said Port of New York, State of New

York, to the Port of London, Kingdom of Great Britain; that they carried an additional person as an able seaman although he performed clerical duty only.

Ninth: That on said voyage of said vessel "American Shipper," from said Port of New York, State of New York to the Port of London, Kingdom of Great Britain, which was made by sea, the said ten able seamen and two ordinary seamen on said vessel were not equally divided into watches while at sea for the performance of ordinary work incident to the sailing and management of said vessel; but contrary to the statutes made and provided, six of such ten able seamen were placed on day work from eight a. m. to five p. m. the next day after leaving port, and continued as such until the arrival of said vessel, "American Shipper", in the Port of London, Kingdom of Great Britain, and were off duty from five p. m. until 8 a. m. the following day throughout the voyage; four able seamen and two ordinary seamen were placed in three watches—one ordinary seaman and one able seaman on watch together on two of the watches, and two able seamen on one watch. This left the vessel with no proper lookout and no adequate force to manage and maneuver said vessel. Neither the whole or any part of said crew of said vessel during said time was needed either for the maneuvering of said vessel or for the performance of work necessary for the safety of the crew or vessel or for the safety of life aboard [fol. 7] another vessel or for the performance of fire or lifeboat or other drills, but, on the contrary, the whole of said sailors during said voyage were employed at ordinary work incident to the sailing and management of said vessel. That said vessel carried six firemen, three water tenders and eight oilers. That on said voyage of said vessel, "American Shipper," which was made by sea, the said firemen, water tenders and oilers were not equally divided into watches while at sea for the performance of ordinary work incident to the sailing and management of said vessel; on the contrary, three oilers performed day duty during all of said voyage, and were off duty entirely from five p. m. until eight a. m. the following day throughout the voyage.

That on or about the 22nd day of February, 1928, during said voyage, all of the firemen on the 8 a. m. to twelve noon watch were ordered and compelled by the Respondent, through the Master or other superior officers of the

said vessel "American Shipper" to go on deck to wash rails, bulkheads and booms on the afterwell deck, said firemen being necessarily absent from the fire room and their duties as firemen for a long period of time. That during said period of time, the duty of attending to twenty-four fires as well as properly attending to water in the boilers, was left to one water tender.

Tenth: That by reason of the foregoing and of failure to divide the seamen on said vessel, "American Shipper", [fol. 8] on said voyage, into equal watches, and/or failure to divide the firemen, water tenders and oilers of said vessel into equal watches, your said Libellant, on or about the 26th day of February, 1928, upon the arrival of said vessel "American Shipper" at the Port of London, Kingdom of Great Britain, demanded his discharge from said vessel and the payment of the balance of wages then standing to his credit and one month's additional pay, and that Libellant be provided with adequate employment on board some other vessel to the port from which he originally shipped, or to the most convenient port of entry in the United States, or to a port agreed upon by your Libellant, or passage back to the United States of America, from the Respondent through the Master of said vesel, also the return of the clothes of said Libellant, which were retained by the Respondent through the Master of said vessel, all of which was refused by the Master of said vessel said Respondent's representative on whom demand as aforesaid was likewise made, whereupon said Libellant left said vessel.

Eleventh: That your Libellant then went to the American Consul in the Port of London, Kingdom of Great Britain, and demanded that the Master of said Vessel "American Shipper", be required to pay him his wages earned, one month's additional wages, that Libellant be provided with adequate employment on board some other vessel to the port from which he originally shipped, or to the most con- [fol. 9] venient port of entry in the United States or to a port agreed upon by your Libellant, or that Libellant be furnished transportation back to the United States, and that said Respondent, through the Master of said Vessel, return the clothes of Libellant to him.

Twelfth: That at that time the Libellant, Livingston H. McCrea, had earned the sum of $25.28 while in the service

of said vessel, no part of which he has received, and neither the whole or any portion of said sum of $25.28, or the additional month's wages amounting to $65.00 has ever been paid, nor was your Libellant furnished transportation back to the United States, nor has the clothes of Libellant, which were wrongfully retained by the Master of said Vessel been returned, although the same was duly demanded.

Thirteenth: That it was dangerous to operate said vessel, "American Shipper" as she was operated as hereinbefore described and with but two seamen on a watch with each of the said three watches, the same being a daily occurrence during said voyage, for the reason that at times it left the vessel with no proper lookout and no adequate force to manage and maneuver said vessel and the voyage of said vessel, "American Shipper", was contrary to the agreement of said Libellant with said defendant, contrary to the statutes made and provided, and said vessel was unseaworthy by reason of said failure to provide proper watches. [fol. 10] That it was dangerous and contrary to the statutes made and provided, to fail to divide the firemen, water tenders, and oilers, into equal watches during said voyage and said vessel was rendered unseaworthy by reason thereof.

That it was dangerous and contrary to the statutes made and provided, to require and cause the firemen on said vessel "American Shipper" to work on the deck of said vessel, washing down rails, bulkheads and booms, and leaving twenty-four fires and the water to the attention of one water tender.

Fourteenth: That by reason of the failure of the Respondent, its servants and representatives, to pay the claim of said Libellant as aforesaid, and to provide said Libellant with adequate employment on board some other vessel to the port from which he originally shipped or to the most convenient port of entry in the United States or to a port agreed upon by your Libellant, or to provide your Libellant with passage back to the United States of America, your Libellant was obliged to pay the sum of $125.00 Dollars for passage back to the Port of New York, State of New York.

Fifteenth: That said Libellant claims to be entitled to the sum of $25.28 Dollars, the amount of wages due Libel-

lant at the time the said vessel "American Shipper" arrived at the Port of London, Kingdom of Great Britain, to [fol. 11] one month's wages amounting to $65.00 Dollars over and above the wages due at the time the said Libellant demanded said wages and left said ship, and the sum of $125.00 Dollars expenses incurred by said Libellant on account of having to secure passage back to the Port of New York, the port from which said Libellant shipped, and the return of the clothes wrongfully retained by the said Respondent through the Master or other Superior Officers of said Vessel "American Shipper", all in accordance with statutes made and provided; also to a sum equal to two days' pay, for each and every day during which said payment of wages was delayed and unpaid, to-wit, from the 15th day of February, 1928, the day upon which demand was made for said wages, up to and including the day when said balance of wages are paid, in accordance with the statutes made and provided.

That all and singular the premises are true and within the admiralty Maritime Jurisdiction of the United States and this Honorable Court.

Wherefore, Libellant prays judgment against said Respondent for the wages due said Libellant on the 26th day of February, 1928, together with one month's additional wages and the amount of expenses incurred by Libellant in securing transportation back to the United States, and the return of the clothes of your Libellant wrongfully retained by the Respondent, and also two days' pay for each of the days the wages due to Libellant are not paid from [fol. 12] the time they were demanded and should have been paid to him and were not paid until the day when the same are paid, in accordance with the decree of this Court, and for such other and further relief as may be proper in the premises.

Gilbert E. Roe, Proctor for Libellant, Office and Post Office Address: No. 55 Liberty Street, Borough of Manhattan, City of New York.

Duly sworn to by Livingston H. McCrea. Jurat omitted in printing.

[fol. 13] IN UNITED STATES DISTRICT COURT

In Admiralty

ANSWER TO LIBEL

99-118

To the Honorable Judges of the United States District Court for the Southern District of New York:

The answer of respondent, United States of America, as owner of the Steamship "American Shipper," to the libel of Livingston H. McCrea, in an alleged cause of action, civil and maritime for wages, alleges upon information and belief and respectfully shows to this Honorable Court as follows:

First: Respondent denies any knowledge or information sufficient to form a belief as to the truth of the allegations contained in Article First of the libel.

Second: Respondent denies the allegations contained in Article Third of the libel.

Third: Respondent admits that the action herein brought by the libellant is for wages alleged to be due, but denies each and every other allegation contained in Article Fourth of the libel.

Fourth: Respondent denies the allegations contained in Article Seventh of the libel, except that it admits that the libellant signed shipping articles for a voyage on the "American Shipper" subject to the terms therein described, and not otherwise.

[fol. 14] Fifth: Respondent denies the allegations contained in Article Eighth of the libel.

Sixth: Respondent denies the allegations contained in Article Ninth of the libel.

Seventh: Respondent denies the allegations contained in Article Tenth of the libel.

Eighth: Respondent denies any knowledge or information sufficient to form a belief as to the truth of the allegations contained in Article Eleventh of the libel.

Ninth: Respondent denies the allegations contained in Article Twelfth of the libel.

Tenth: Respondent denies the allegations contained in Article Thirteenth of the libel.

Eleventh: Respondent denies the allegations contained in Article Fourteenth of the libel.

Twelfth: Respondent denies the allegations contained in Article Fifteenth of the libel, except that it admits that the action is within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

Further answering the libel and for a first, separate and complete defense this respondent, upon information and belief, alleges:

[fol. 15] Thirteenth: That the libellant herein who signed shipping articles pursuant to the terms therein specified as alleged in Article Seventh of the libel herein wilfully deserted the ship, the "American Shipper," at the Port of London, and although advised of her time of sailing, refused to rejoin her prior thereto, leaving all of his personal effects aboard the said ship. That said desertion was wilful and followed the refusal of the American Consul in the Port of London, Kingdom of Great Britain, to require the master of the "American Shipper" to discharge him, the American Consul advising him that he was not entitled to said discharge.

Fourteenth: All and singular the premises are true.

Wherefore, respondent prays that the libel herein may be dismissed with costs, and that respondent may have such other and further relief as in the premises may seem proper.

Charles H. Tuttle, U. S. Attorney; Edgar G. Wandless, of Counsel, Proctor for Respondent, Office & P. O. Address: 45 Broadway, Borough of Manhattan, City of New York.

[fol. 16] In United States District Court, Southern District of New York

Admiralty

No. 99-118

Livingston H. McCrea, Plaintiff,

vs.

United States of America, Defendant

Statement of Evidence

Before Hon. John C. Knox, District Judge

New York, May 6, 1932.

Appearances:

John M. Scoble, Esq., Proctor for the Plaintiff.

George Z. Medalie, Esq., United States Attorney, for the Government, by F. H. Cunningham, Esq., Assistant U. S. Attorney.

(Mr. Scoble opens the case on behalf of the plaintiff.)

(Mr. Cunningham opens the case on behalf of the defendant.)

Livingston H. McCrea, plaintiff, called as a witness in his own behalf, being duly sworn, testified as follows:

Direct examination.

By Mr. Scoble:

Mr. Scoble: Do you stipulate that on the 15th day of [fol. 17] February, 1928, the United States of America was the owner of the Steamship "American Shipper"?

Mr. Cunningham: I so stipulate.

Mr. Scoble: Will you stipulate that the home port of the "American Shipper" was the Port of New York?

Mr. Cunningham: I think so, yes.

Mr. Scoble: And that she was in port on the 9th day of July?

Mr. Cunningham: That was the day they sailed out of here.

Q. Mr. McCrea, where do you reside?
A. Newfield, New York.
Q. Did you reside there on the 9th day of July, 1928?
A. I did.
Q. Were you in the City of New York on the 9th day of July, 1928?
A. I was.
Q. Do you know whether or not the steamship "American Shipper" was in port on that day?
A. I do.
Q. Was it?
A. It was.
Q. What was your trade or occupation on the 15th day of February, 1928?
A. A fireman aboard the steamship "American Shipper."
Q. Did you sign shipping articles on board the "American Shipper"?
A. I did.
Q. On what date?
A. On February 15, 1928.
Q. At what wages?
A. $65 a month.
Q. For what voyage?
A. The voyage to London and return to New York.
Q. In that time did you see any sailors signing shipping articles?
A. I did.
Q. How many?
A. There were eleven able-bodied seamen and two ordinary.
[fol. 18] Q. Did they sign the shipping articles in your presence?
A. They did. We were all in the saloon with the shipping commissioner and the captain.
Q. Can you tell how many firemen signed shipping articles on that day?
A. There were six firemen.
Q. How many water tenders?
A. Three.
Q. How many oilers?
A. Eight oilers.
Q. How many engineers?

A. One chief engineer and three assistants.

Q. Mr. McCrea, do you know on that voyage how the sailors were divided in relation to watches?

A. I do.

Q. Will you please state that.

A. There were six sailors divided into three equal watches, two able-bodied seamen on one watch, one able-bodied and one ordinary seaman on one watch, and one able-bodied and one ordinary seaman on the other watch. There were six sailors divided into—worked the day work from eight in the morning to twelve noon; from one to five; there was one man doing yeoman's work.

Q. Was he working day work?

A. He was.

Q. Did you ever see the six men you said were working day work?

A. I did.

Q. When?

A. On two or three occasions at least that I can recollect. We had 9 days going across, and after I came off watch—my watch was 8 to 12, why, we sat on deck in the afternoon, after one o'clock, and I saw the boatswain turn those men to.

[fol. 19] Q. Do you mean the six men?

A. The six men.

What were they *going*?

A. Painting, cleaning the paint work, and various things around the deck.

Q. What deck were they on?

A. On the after well deck, two decks below the bridge, just forward of the stern.

Q. Can you locate that deck in relation to the point where the lookout is kept or the gyropilot is?

A. The lookout is way forward of the bridge, in fact it is on the forecastle head. Where the gyropilot is on this ship, it is amidship, and just above the boat deck, I believe, and these men were aft almost to the stern—two decks below the bridge.

Q. Did you see these six men at any other time?

A. Yes.

Q. Where?

A. I saw them in their rooms at night—visited with them and talked with them.

Q. How many sailors were in the rooms in the forecastle at the time you visited and talked with them?

A. There were ten—the six men on day work and the four men on the other two watches.

Q. Did the man you said was used as a yeoman, did he sleep with the other sailors in the forecastle?

A. I did not see him.

Q. Did you ever see these men at mess?

A. I did.

Q. How many men did you see at mess?

A. I saw eleven men at mess.

Q. State who they were.

[fol. 20] A. The six men on day work, the four men that were on the other two watches, and one man that was supposed to be on watch at meal time. He was at supper with us.

Q. You have stated there were eight oilers; can you state how they were divided in relation to watches?

A. There were three oilers, divided in equal watches in the engine room. There were two oilers with the refrigerating engineer, divided into equal watches in the refrigerator room. There were three oilers working day work from 8 to 12, and one to five, in the engine room and the fireroom, doing various work.

Q. Mr. McCrea, do you know the names of the six men, who were the six oilers who were working day work?

A. I do.

Q. Will you state them.

A. Churchill, Willmer, Conlon, Avery, Shaffer and Leslie.

Q. How did you obtain their names?

A. There was a notice on the bulkhead of the firemen and sailors' mess room that the following men shall do day work on the voyage over, or words to that effect, then their names and, as I remember, "By order of the Captain."

Q. Now, Mr. McCrea, do you remember any time at which the firemen were ordered up to deck, up on the deck?

A. I do.

Q. When was that?

A. On February 22, on the morning watch, 8 to 12.

Q. What was your watch?

A. My watch was 8 to 12.

Q. Were you ordered up on deck at that time?

A. I was.

[fol. 21] Q. Will you state the circumstances?

A. The third assistant told the firemen, the other firemen and myself who were on watch, that we had to go above and clean some paint work which had been spattered with waste oil—that I was to take some kerosene and some rags and go up with the other firemen and do that work. I went up on deck and the other four firemen who were on the other watches had been broken out of their forecastle and turned to do this work with us. I shared some of the rags I brought up and I was instructed to bring up enough, and some of the kerosene that was in the bucket.

Q. How long were you up on deck?

A. About 30 minutes.

Q. Was any fireman in charge of the fires at the time you were on deck?

A. There was not.

Q. How many fires were there?

A. 24 fires, 12 fires in each room.

The Court: You mean the furnaces were deserted when you went up?

The Witness: I do, sir, your Honor.

Q. Now, Mr. McCrea, when did you arrive at the port of London?

A. On February 26.

Q. At that time did you have any talk or conversation with the master?

A. I did.

The Court: Is this boat an oil burner?

The Witness: Yes.

Q. Will you state that conversation.

A. When the men were being issued half of their wages, I went to the Captain in my turn and told the captain that I wanted my discharge, due to the fact that the seamen's [fol. 22] act had been violated by the men not being divided into equal watches, under Section 2 of the Seamen's Act; I also demanded a month's extra wages and transportation back to the United States, under the United States Revised Statutes 4582.

Q. What did the Captain say?

A. The Captain said he would see me at the American Consulate in the morning.

Q. Did he say he would discharge you or not?

A. He said he would not discharge me.

Q. Did you go to the American Consulate's office in the morning?

A. I did.

Q. Did the Captain appear?

A. He did not.

Q. Did they at that time request you to put your charges in writing?

A. They did.

Q. Did you do so?

A. I did.

Q. Did you ever receive any reply from them in relation to your written charges?

A. I did not, although the consul said, he said he would send one.

Q. Did you return to the ship after you had seen the American Consul?

A. I did.

Q. Did you attempt to see the captain?

A. I did.

Q. State what you did.

A. I came aboard the ship and stayed all night, and in the evening when I came aboard I tried to see the master by going to his room and knocking at his door. In the morning after breakfast I tried again. I went to his room and knocked on the door, but I could not see him, I asked the chief mate was he aboard. He said he did not know.

Q. Then what did you do?

A. I then asked the chief mate for a pass for my clothes [fol. 23] off the ship. He said he would not give it to me, or he could not give it to me. I took my clothes and started out, but I was stopped and had to return them to the ship, and then left the ship.

Q. Mr. McCrea, were you ever paid your wages which were due you at that time?

A. I was not.

Q. Were you ever paid any additional month's wages?

A. I was not.

Q. Did you ever secure your clothes?

A. I have not.

Q. When did you return to the United States?

A. I do not remember just the date, but I came to Liverpool and came over from there.

Q. Did you pay your own transportation?

A. I did.

Q. Where did you land?

A. I landed at Boston.

Q. On what ship did you return?

A. I do not remember the ship, but it belonged to the Furness-Withy Company.

Q. Was it the Nova Scotia?

A. The Nova Scotia.

Q. What did that voyage cost you?

A. From Liverpool to New York?

Q. Yes, or from Liverpool to Boston first, and then to New York?

A. About $93.

Q. From Liverpool to Boston?

A. About $93.

Q. How much from Boston to New York?

A. About $8.

Q. Have you ever been repaid that money?

A. I have not.

[fol. 24] Q. Have you computed your wages from the time you made your demand?

A. I have.

Q. How much were they?

A. $25 and some cents.

Q. Have you got a paper with the computation on?

A. I have.

Q. Will you refer to it.

A. (Producing paper) $25.28.

Q. What was your month's wages?

A. $65 a month.

Q. What did you say was the cost of transportation back?

A. $101.

Q. What was the value of your clothes?

A. $40, about.

The Court: Did you ever get your clothes?

The Witness: No, sir, I made an attempt to get them, but they refused to let me get them.

Q. Have you computed the amount due under the statute, two for one?

A. I have.

Q. How much was that?

A. $6510.33.

Q. What is the total amount you claim?

A. $6741.61.

Cross-examination.

By Mr. Cunningham:

Q. You have not that notice containing those names with you?

A. My letter to the American Consul, I kept a copy of it, and it was sent to the American Consul, and I kept a copy, and I believe Mr. Scoble has——

Q. You have not the original notice that you spoke of, have you?

A. The original notice that was posted?

[fol. 25] Q. Yes.

A. No, I have not, that was part of the ship's property.

Q. How did it happen, having taken all the care to master these details that you have mentioned, that you overlooked taking down this notice so that you would have that also to present with this case in the course of time?

A. Do you want me to answer that?

Q. Yes, how did it happen you did not take it?

A. That was part of the ship's property. I had no right to it whatsoever.

Q. Was it tacked up or pasted up?

A. I do not remember whether it was tacked or pasted. It was on the bulkhead of the firemen and sailors' mess room.

Q. How many watches were the members of the deck department divided?

A. Six members of the deck.

Q. I said into how many watches was the deck department divided?

A. Into three watches.

Q. The same number for the engine department, and you state that on the occasion of this cleaning up of the deck which had been smeared with oil, you were ordered up on deck to assist in that work?

A. I was.

Q. And how many firemen were on duty at that time?

A. There were two firemen, one in the after fireroom and myself in the forward.

Q. And they were both ordered up on deck?

A. They were.

Q. And who was in charge of the engine room department, your watch?

A. The third assistant engineer.

[fol. 26] Q. What was his name?

A. I do not recollect it now.

Q. Why, you don't remember the name of the engineer in charge of your watch, Mr. McCrea?

A. Not at this time, no, sir.

Q. You committed to memory, however, the names of these other sailors that you saw posted on the notice, didn't you?

A. I did not.

Q. And you don't remember the name of the engineer in charge?

A. I do not.

Q. And he was the one that ordered you up to do this work and leave all these fires unguarded?

A. He was, sir.

Q. Was it Nielson?

A. Nielson was the first assistant, I believe.

Q. Was he the one in charge of your watch?

A. He was not, the third assistant was in charge of my watch.

Q. Do you remember MacHardy?

A. No, I believe there was a man at that time, an oiler; the name sounds familiar.

Q. Ian S. MacHardy, an oiler, do you remember him?

A. The name sound familiar, yes; I believe he was an oiler.

Q. Was he on the watch with you?

A. I could not tell you that.

Q. Have you read over the depositions taken in this case in which Captain Cumings has testified as to the matters involved and also Mr. Nielsen and Mr. MacHardy?

A. Yes.

Q. Recently?

A. Well, not within a month anyway.

Q. You are therefore familiar with the testimony which [fol. 27] Captain Cumings gave with respect to the assignment of the members of the crew to the watches, aren't you?

A. Yes.

Q. You know what he testified to?

A. I do.

Q. You know it is quite contrary to what you have testified to?

A. I realize that, sir.

Q. When you got to London, as you said, you demanded your pay up to date in full, and the Captain said, "Meet me at the Consulate I will be there tomorrow morning and we will thrash this thing out," did you not?

A. I demanded my discharge and wages in full.

Q. Yes, a discharge and transportation back to the United States, didn't you?

A. Yes.

Q. And the Captain did not oppose you, did he?

A. No.

Q. Let me see, you mentioned two or three sections of the law by number, quite as though you were familiar with them at that time, didn't you?

A. I did.

Q. You said, "I demand this under and by virtue of such and such a section of the shipping law"?

A. I said first that the watches had not been divided equally, and then quoted.

Q. Yes, and you quoted the laws.

A. I did, sir.

Q. And he asked you, or he said to you, did he not, "Why I don't think I know what they are about; I will have to look them up."

A. He said something like that. I do not know his exact words.

Q. And he gave you the address of the American Consulate and said, "I will meet you there tomorrow morning and we will thrash this thing out."

A. He did, after I asked for it.

[fol. 28] Q. You are pretty well familiar with the statutes which safeguard American seamen, aren't you?

A. No, sir, I am not.

Q. You have made a special study of these matters on board the ship?

A. You mean aboard this ship?

Q. Yes.

A. I did not, sir.

Q. How did you come to be so familiar with these particular sections which you have quoted—which you quoted the number of to the Captain, and so forth?

A. There was an article in the Seamen's Journal at that time, or near that date, giving the whole detail of some case that had been decided by the United States Supreme Court.

Q. And from that you got your knowledge and determined that not being quite satisfied with the way the ship was run, you would apply that or demand your discharge pursuant to that, was that it?

A. No, sir.

Q. At any rate, the Captain said to you to meet him up at the Consul's office the next day?

A. He did.

Q. And he gave you the address, I believe, didn't he?

A. After I requested it.

Q. Had you been there before, I mean to London?

A. No, sir, not for some years.

Q. You have relatives somewhere in England, haven't you?

A. No, sir.

Q. Where are your relatives, in Ireland?

A. No.

Q. Have you any relatives at all in England?

A. No, sir.

Q. In Liverpool or any part of England?

A. No.

[fol. 29] Q. You have some friends?

A. I have some friends, in-laws in Birmingham.

Q. Relatives then?

A. They are not blood relatives, no.

Q. If they are relatives by your marriage or whatever it is, they sort of come within that general scope, don't they?

A. Yes.

Q. And you went to see them before you came back, didn't you?

A. The only reason——

Q. I didn't ask you that, I am just asking you if you went to see these relatives?

A. I had to go somewhere.

Mr. Scoble: I object to that as immaterial and irrelevant.

The Court: I will allow it.

Q. Where did they live?

A. Birmingham.

Q. How long did you stay with them?

A. Just as soon as——

Q. How long did you stay with them?

A. Until I got transportation to get back.

Q. How long did you stay with them?

A. I do not remember exactly now. I think about——

Q. When did you leave?

The Court: You think about what?

The Witness: About three weeks.

Q. When did you leave the ship?

A. I think it was February 28.

Q. And you spent some three weeks with them and then took passage back on the Nova Scotia?

A. Yes, I had to stay there until I could get money.

The Court: Where did you get the money?

[fol. 30] The Witness: I wired to friends in America.

Q. Did you try to get a ship?

A. I knew it was useless to get a ship.

Q. I didn't ask you whether it was useless, did you get a ship?

A. I did not dare try to get a ship.

Q. Why?

A. I was threatened with arrest by the American Consul.

Q. Why?

A. As being a deserter.

Q. You went up to the American Consul's office the next morning and got there around noon?

A. On the 27th I got there around nine or ten o'clock.

Q. What time did the Captain say to you on the day before, when this whole matter started, that he would be up there, around noon or the next morning?

A. He said he would meet me there in the morning.

Q. So you went up there and got there, say, around half past nine. How long did you stay there?

A. Pretty near two hours.

Q. So you left about half past eleven. Have you been going to sea a good deal, Mr. McCrea?

A. I have.

Q. You are pretty familiar with ships and the manner in which they are run, and the general business of ships and their officers?

A. In the last six years——

Q. Just yes or no.

A. No.

Q. You know that when a captain gets to port he has considerable ship's business to do with the authorities, does he not, usually on the day of landing?

[fol. 31] A. Why, he is commander of the ship.

Q. He has business with the customs and business usually with his agents, and he is a rather busy person, as a matter of fact, particularly during the first day, isn't he—frankly, isn't he?

A. Yes.

Q. So that when he told you to meet him at the American Consulate and you only waited until half past eleven, why, you did not wait until he came, did you?

A. I left the American Consulate because I was practically told to leave.

Q. At any rate, you did not wait until Captain Cumings came there, as he said he would meet you the next day, you did not wait for him?

A. I was told I could not see Captain Cumings.

The Court: Who told you that?

The Witness: The American Consul.

Q. The American Consul had not come there yet, had he?

A. I could not tell you that.

The Court: What reason did he tell you you could not see him?

The Witness: I do not know, your Honor, I asked to see see the captain and he said, "You cannot see him."

Q. Mr. McCrea, why would any American Consular office tell you that you could not see the master of your ship when you told him, as I suppose you did, that you came up

there by appointment to see him, to consult with him; can you think of any reason?

A. Do you want me to give a reason?

Q. Yes, certainly, any reason you think of.

A. My experience in the past with American Consuls [fol. 32] has been that they are also busy men and they want to get rid of seamen just as soon as they can and if they do not—if they in their mind do not think that the case deserves attention, that they would care to give it, why, we are dismissed.

Q. You dealt with Mr. Pinkerton and Mr. Miller, did you, at the American Consulate?

A. Yes.

Q. They treated you courteously, didn't they?

A. Part of the time, yes.

Q. After you had laid before them the basis—the gist of your theory of your discharge, they told you they did not think there was anything to it, didn't they?

A. I had considerable trouble trying to lay it before them.

Q. But you did lay it before them?

A. I did.

Q. And they did not take the view that you took, isn't that so?

A. That is so.

Q. And they said, "Well, you can go back and address this to us in writing"?

A. They asked me——

Q. H'm?

A. I asked them for their statement in writing first. They said they would give it, providing I give them a statement in writing.

Q. So you did go back and you did send them a statement?

A. I did.

Q. And that statement is attached to the commission, is it not?

A. Their testimony was taken.

The Court: Well, that statement is on file here.

Q. Now, you know, do you not, Mr. McCrea, that the master of a ship cannot discharge a seaman upon his re- [fol. 33] quest, without the consent of the American Consul, in foreign ports, don't you?

A. I understood that the master had a right to discharge a seaman whether in a foreign port or where, providing the charge was just.

Q. In the absence of acquiescence by the American Consul?

A. Well, it was up to the captain, not the American Consul.

Q. Mr. McCrea, don't you know that when you signed the articles for a trip, a round trip, as this was, that if the captain wished to discharge you at London without your consent that it would be impossible without the acquiescence and approval of the American Consul?

A. That would be, yes.

Q. All right, that is when the captain wants to discharge you. Now, if you want to be discharged and the captain says, "Yes, I will agree to it", don't you know that you must in addition to that go before the American Consul and get the approval of the American Consul first before the captain can do what you and he want to do?

A. I don't know that.

Q. You did not know it then either?

A. No. Can I make myself clear on that?

Q. I think you did.

A. Yes.

Q. Don't you know as a matter of fact that the Captain of the "American Shipper" could do nothing with respect to your request in the absence of approval by the American Consul?

A. Under these——

Q. I just ask you whether you knew that or not.

A. I would like to explain.

Q. I will give you an opportunity. I just ask you now [fol. 34] whether you knew it.

A. I don't think I did.

Q. Didn't you know that the American Captain's hands were completely tied up without the approval of the American Consul?

A. No.

Q. Didn't you know that before a man could be discharged in London that the American Consul would have to get the approval of the British immigration authorities to such discharge?

A. I thought that the captain would have to.

Q. But you did know before such a discharge could be made, that there would be the necessity of an approval by the British immigration authorities, didn't you?

A. Not until I got over there.

Q. Well, you learned it from the American Consul and from Pinkerton and Miller, didn't you, in your conversation there?

A. I did.

Q. And that is the reason why you were keeping out of reach, for fear you would be arrested while you were in England, wasn't it, because you knew you were there against the immigration laws of Great Britain, isn't that so?

A. Yes.

Q. When you left the American Consulate and went back to the ship and you say you tried to see the captain and you were not able to, you went to his room that night?

A. Yes.

Q. And as a matter of fact you do not know whether he came back on the ship until late that night, do you?

A. No.

Q. He may have been in his room when you went there or he may not have been, just as the fact might be, isn't that true?

A. I knocked very loudly.

[fol. 35] Q. You read his testimony, and if I recollect he says he returned to the ship late that night, around 12 o'clock, so it is possible when you did knock on his door, and I do not doubt that you did, that he had not returned yet to the ship. Now, the next day you say you went there again and you did not succeed in seeing him.

A. The next morning very early.

Q. Do you know how it was that you did not happen to arouse him then?

A. I could not tell you.

Q. He did not send word to you refusing to see you, did he; there was not any refusal, I mean, you just did not have the good luck to connect up, wasn't that it?

A. I did not have the good luck to bring him to the door.

Q. Well, at any rate, he did not send out word, "I don't want to see this man McCrea," did he?

A. No.

Q. So, for all you know, when you got there and went to his room, he might have been in some other part of the

ship. The fact is that you say you tried to see him on the Monday that you were there, and then on the Tuesday morning, and you did not succeed?

A. He could not have been in any other part of the ship, except the officers' quarters, because I looked the ship over to try to find the captain.

Q. At any rate, you did not have any further talk with the captain?

A. No.

Q. And when he testifies that when he said to you to meet him at the American Consul's office tomorrow morning at [fol. 36] such and such a time, to this day you have never seen him again?

A. I have not.

Q. Then you attempted to leave the ship with all your belongings, and you say you asked for a pass and you were refused it?

A. I was.

Q. Then did you tell them why you wanted to go ashore?

A. I told them I was leaving the ship.

Q. Who did you say this to?

A. The chief mate, that I was leaving the ship, that I would like to have a pass for my clothes.

Q. In other words, you told him you were quitting?

A. I told him I was quitting.

Q. When you told him you were quitting, did you——

A. It meant that I was quitting.

Q. That you were not coming back?

A. Yes, it meant that.

Q. You were not concealing from him anything?

A. No, no, I had nothing to conceal.

Q. You were entirely frank in all this thing; you took the position that the laws protecting me have been violated, and I am leaving?

A. Not the laws protecting me, but the laws of the safety of life at sea.

Q. I understand, but the statutes had been violated and therefore you were leaving the ship?

A. Yes.

Q. And the first mate or the chief officer refused you a pass, refused to allow you to remove your belongings from the ship, whereupon you left them and left the ship?

A. Yes.

Q. That was on Tuesday, wasn't it?

A. Monday or Tuesday, I forget.

[fol. 37] Q. It was the day after you were at the American Consul's office?

A. Yes.

Q. You knew when that ship was to sail, didn't you?

A. The American Consul so advised me.

Q. You knew it was going to sail the following Friday or Saturday. Did you make any effort to rejoin your ship?

A. No.

Q. It sailed with your knowledge it was sailing at that time?

A. It did.

Q. And you wilfully refrained from rejoining the ship in accordance with the shipping articles that you had signed?

A. The contract had been violated and therefore I had a right to leave the ship.

Q. I say, you were not left ashore by accident?

A. No, I was not.

Q. You simply refused to rejoin the ship?

A. Yes.

Q. And you had not been discharged by the captain?

A. No.

Q. You had not been discharged by the American Consul, had you?

A. No.

Redirect examination.

By Mr. Scoble:

Q. Mr. Cunningham has inquired in relation to how you remembered the names of the sailors who were on day duty. At the time you made your complaint to the American Consul, did you give him a statement giving the names of those men?

A. I did.

Q. Did you keep a copy of it?

A. I did.

Q. Is that a copy (handing paper)?

A. That is a copy.

[fol. 38] Mr. Scoble: I offer this in evidence.

Mr. Cunningham: I object to the production of that as a copy. I object to its being received in evidence.

The Court: Oh, I will take it as tending to support his statement as to how he recalls these names, solely for that purpose.

(Marked Libellant's Exhibit 1.)

Q. Is it on account of that copy of the statement you say you delivered to the American Consul, that you recall the names of these men?

A. Yes.

Q. In relation to the date when the men were ordered up on deck to clean the deck, was that in the morning or in the evening?

A. In the morning.

Q. On the 8 to 12 watch?

A. On the 8 to 12 watch.

The Court: Had you dumped the oil?

The Witness: No, sir.

The Court: Had some of your watch dumped it?

The Witness: I could not tell you that, sir.

The Court: When was it dumped, do you know?

The Witness: I could not tell you.

Recross-examination.

By Mr. Cunningham:

Q. As a matter of fact, the oil which causes such a mussing up of the deck is usually dumped by the previous watch, [fol. 39] is it not, because it has collected at the end of their watch, isn't that the fact?

A. Each watch dumps their own oil.

Q. And that oil is collected at the end of the watch?

A. That is collected at the end of the watch.

Q. In other words, they give a clean condition for the watch?

A. Yes.

Q. For the watch which is following them, as far as possible, in respect to that matter?

A. We leave our stations in good order.

Q. Since your return to the States, have you been going to sea?

A. I tried to once, but was unable to. I passed an examination with the United States Engineers Department as

an engineer, a Civil Service examination, but due to the fact I could not report in time I lost the position.

Q. But you have made no voyages since this particular one?

A. No.

Q. You are living up at Newfield, New York?

A. At the present time I am living in New York City, looking for work.

Q. But your home is in Newfield, New York?

A. Newfield, New York.

Q. That is right near Ithaca, isn't it?

A. Yes.

Mr. Scoble: I offer in evidence the following questions and answers taken from the deposition of Schuyler F. Cumings, Skipper of the Steamship Leviathan, taken on behalf of the respondent, on the 3rd day of February, 1932.

Mr. Cunningham: Just what are you doing?

Mr. Scoble: I am going to read in some of it.

[fol. 40] Mr. Cunningham: I am going to offer the entire deposition. I do not know of any special reason why you should pick out particular questions now.

Mr. Scoble: To corroborate the testimony. Our contention is going to be that even taking the testimony of the captain, that the statute was violated.

The Court: All right, go ahead.

Mr. Scoble: Oh, I would just like to ask Mr. McCrea one more question.

By Mr. Scoble:

Q. During any time of the voyage was there any emergency which arose, which required the use of the entire ship's crew to be called?

A. No.

The Court: To save time I think you might stipulate—well, you want to specify certain portions of the captain's statement?

Mr. Cunningham: I do not want in any way to interfere with the orderly procedure of presentation of Mr. Scoble's case, but if he is just going to select from the deposition which the respondent has taken of Captain Cumings, certain questions, it seems to me that those could be more or

less emphasized in a memorandum or argument to the court, instead of cluttering up the record.

The Court: How many of them are there?

Mr. Scoble: Probably 15 or 20. I would consent to the [fol. 41] putting of the whole deposition in evidence, except there are three or four questions in the deposition I want to object to.

(Discussion off the record.)

Mr. Scoble: The following are the questions and answers I want to read from the deposition.

"Q. Captain, what is your occupation?
"A. Master mariner."

This is page 34:

"Q. Were you the master of the "American Shipper" during the period from February 15, 1928, to February 26, 1928?
"A. I was."

Then I will skip three questions.

"Q. Now, on the voyage which left New York February 16, 1928, en route for London and return, do you remember a man by the name of Livingston H. McCrea being a member of the crew?
"A. I do.
"Q. What was his job?
"A. Fireman.
"Q. Where did he sign on?
"A. At the port of New York.
"Q. Did he sign on for the round voyage?
"A. He signed on for the round voyage, yes.
"Q. Did you ever have any trouble with McCrea on the voyage going over?
"A. Not on the voyage going over.
"Q. As far as his attention to duties and so forth are concerned, you never personally had any trouble with him?
"A. Not at all.
"Q. When the ship got to London did you see McCrea?
"A. I did.
[fol. 42] "Q. State what happened at that time?

"A. Well, while advancing pay due to the crew of the steamer "American Shipper" in the port of London on the day of arrival, McCrea demanded that he receive his full amount due him.

"Q. And when McCrea came along you say he demanded the full amount that was due him at that time?

"A. The full amount he had earned at that time."

Page 36:

"Q. And when he demanded the full amount due him at that time, what did you do?

"A. I asked him his reason.

"Q. What did he say?

"A. He quoted Section 2 of the Seamen's Act, and Revised Statutes 4583, merely by their titles, so I told him he would have to see me at the American Consul's.

"Q. At any rate you did not give him the amount which he demanded?

"A. I did not give him anything. He would not accept half his pay."

Page 38:

"Q. Did he at the time of making the demand give any explanation of his demand whatever?

"A. None at all.

"Q. That is all he said, gave the reference to Section 2 of the Seamen's Act and so forth?

"A. The titles.

"Q. And the section of the Revised Statutes?

"A. That is all."

Page 41:

"Q. Now, Captain, Mr. McCrea has brought an action against the United States of America, as owner of the ves- [fol. 43] sel, claiming the amount of wages due him at the time of arrival in London, in the sum of $25.28; and also in addition a month's wages amounting to $65 above the wages mentioned as due, and the sum of $125 for expenses alleged to have been incurred by him for the purchase of passage back to New York from London, and also for the return of the clothing which he claims was wrongfully retained by the respondent, through the master or other of-

ficers, said claim being based on what he claims was a violation of law in reference to the way in which the watches were arranged on board the ship. He states that contrary to statute, the watches both in the deck department and in the engine department were improperly arranged. He states that there were ten able seamen and two ordinary seamen on the vessel at the time. Can you state whether that statement is correct or not?

"A. That statement is not correct.

"Q. Why?

"A. We had eleven able-bodied seamen and two ordinary seamen.

"Q. He states that contrary to the statutes these men were not equally divided into watches, but that six of the able seamen were placed on day work from eight to five daily; is that true?

"A. I don't know what he refers to by day work. We had three men on each watch; and then we had a storekeeper; we had a yeoman, and we had another man.

"Q. How were the watches divided?

"A. The watches were four on and eight off.

[fol. 44] "Q. So that one watch was served from 12 to 4 and another one from 4 to 8?

"A. Yes, sir.

"Q. And a third watch?

"A. From 8 to 12."

Page 45, the last two questions:

"Q. Did you in addition to those who were on the regular watches during the day time from 8 to 12 and 12 to 4 have any other than the three whom you have described as being on watch on duty in deck work?

"A. Yes, sir.

"Q. Will you tell us about them?

"A. There was a carpenter; there was a boatswain; a seaman about decks there was a deck watchman, and performing his eight hours out of the twenty-four. There was a man performing various duties, including those of yeoman, during the time that he was performing his eight hours out of twenty-four; there was a man who had charge of the store rooms, keeping the various watches supplied with what materials they might need from the ship's stores and performing eight hours out of twenty-four.

"Q. What can you say, Captain Cumings, in reference to this statement that six of the ten able seamen were placed on day work from eight to five the day after leaving port and continued as such until the arrival in London; were these men he refers to those which you have just mentioned, or part of them?

"A. He might have been mistaken, having seen men around deck. I don't know where he gets his information from. I don't know what he is thinking of. We have men there. There are three men on a watch. There are three [fol. 45] men on a watch, day time as well as night time. We also have other men. There is a boatswain, a carpenter, and, as I have stated, three other seamen employed at different times about the decks."

Page 49:

"Q. Now, you have stated that you carried, I think you said, eleven men.

"A. Eleven able seamen.

"Q. And two ordinary seamen?

"A. Ordinary seamen.

"Q. Is it not a fact that one of the able-bodied seamen was used in clerical duties all the time?

"A. Not all the time.

"Q. But at the time he was doing his watches he was used in clerical duties?

"A. He was sometimes used for clerical duties, and sometimes used for other duties about the ship. These duties that he performed were duties incidental to the navigation of the ship."

Page 50:

"Q. Was the whole or any part of the crew during said voyage needed for the maneuvering of the vessel or performance of work necessary for the safety of the crew or vessel, or for the safety of life aboard another vessel, or for life boat, fire or other drills?

"A. I don't understand your question.

"(Question repeated.)

"The Witness: Were they needed? I don't understand your question.

"Mr. Scoble: All I am asking is whether any emergency [fol. 46] ever came up by which it became necessary to do that on that voyage.

"The Witness: There was no emergency. We held our fire and boat drills as called for by law."

Bottom of page 51:

"Q. While the men were on watch did not one of them at various times have to call the next watch, and also get coffee for the officer on watch?

"A. He had to call the next watch, his relief, and the relief of the others that were on duty at that time, but he never had to wait on the officers as personal servants of any character."

OFFERS IN EVIDENCE

The libellant rests.

Mr. Cunningham: Mr. Scoble, will you consent to the introduction in evidence of a photostatic cpoy of page 14 of the official log of this voyage, after having compared it with the official log?

Mr. Scoble: Yes.

Mr. Cunningham: I offer in evidence page 14 of the official log of the steamship "American Shipper". In lieu of the original, that is, the official log itself, which is on file with the Commissioner, a photostatic copy is offered by the respondent, with the consent of counsel.

Mr. Scoble: I object to this as incompetent, irrelevant and immaterial, and as a self-serving declaration. The reason for the objection is that they state in that that he [fol. 47] was a deserter. Now, our claim is that under the statute he was not a deserter, and it may go to the very bottom of this case.

The Court: I will take it simply as a contemporary entry in the official record of the ship of the Captain's version of this transaction.

(Marked Respondent's Exhibit A.)

Mr. Cunningham: I will offer in evidence photostatic copy of the United States Certificate of Inspection of the Steamship "American Shipper", which was issued by the

authorities of the Department of Commerce and which would expire on February 25, 1928. In other words, this voyage was begun somewhere around February 20, 1928, and this certificate was still in effect covering the ship.

Mr. Scoble: I have no objection to make on account of it being a photostatic copy of the certificate. I do object to it on the ground that it is immaterial, irrelevant and incompetent. The United States Court of Appeals has held that the fact that the vessel carries a larger crew than is required by its certificate of inspection, is not material in relation to this statute.

The Court: I will take it for whatever it is worth.

(Marked Respondent's Exhibit B.)

[fol. 48] WALTER N. ELLIOTT, called as a witness on behalf of the respondent, being duly sworn, testified as follows:

Direct examination.

By Mr. Cunningham:

Q. What is your business—who are you connected with?

A. I am clerk of the files of the U. S. Shipping Commissioner's office in New York City.

Q. Did you on receipt of a subpœna produce in court this book which I hand you?

A. I did.

Q. What book is that?

A. That is the official release book of the various ships that are paid off between the dates as shown on the book.

Q. How is this book made up?

A. This book is made up by the Shipping Commissioner when he pays off the ship. He goes aboard the ship and pays off the crew and as each man is paid off he signs his name alongside of his rating, acknowledging the amount of money.

Q. Does that book include the payoff of the Steamship "American Shipper" for the voyage which ended in New York directly subsequent to February 28, 1928?

A. It does.

Q. When the men are paid off, do they sign the book?

A. Yes.

Q. Where a man has been logged as a deserter, what is done by the Shipping Commissioner with respect to any

wages which may have been earned by him or may have been due him at the time of his desertion?

A. The Commissioner makes the entry in the book alongside of the proper rating, to fill up the vacancy in the rating which would occur——

[fol. 49] Q. And the name of that particular man is written in by the Shipping Commissioner?

A. Yes.

Q. And is it written in in a different colored ink, as a rule?

A. As a rule they usually write it in red ink.

Mr. Cunningham: I offer in evidence page 288. That is the only page that shows the record of McCrea as a deserter by the Shipping Commissioner.

Mr. Scoble: I object to it as incompetent, irrelevant and immaterial.

The Court: I do not think it has any bearing upon it.

Mr. Cunningham: I will withdraw it. I do not think there is any use of overburdening the record on a thing there is not very much dispute about. He claims he was not a deserter and we claim that he was.

Now I offer on behalf of the respondent the deposition taken upon notice, of the testimony of Captain Schuyler F. Cumings, taken on February 3, 1932.

Mr. Scoble: I want to expedite the hearing, but Mr. Cunningham is offering the whole deposition in evidence now. If I could put on the record an objection to two questions here.

The Court: Very well.

Mr. Scoble: I object to the question on page 40—"when you came back to New York, did you make a report of his not returning on the ship? A. I had to report his absence from the crew." I move to strike out the answer as [fol. 50] not responsive, and also as a matter of opinion.

The Court: That is simply his view of what he had to do, in view of the fact that the man was not there. I don't think it makes any difference one way or the other.

Mr. Scoble:

"Q. Your report was one of what?

"A. One of desertion; that was the only one I could make for a man missing as he was."

I move to strike out the answer.

The Court: All right, I will grant your motion.

Mr. Cunningham: Do you strike out his whole answer? His question was, "Your report was one——"

Mr. Scoble: "One of desertion."

Mr. Cunningham: There is certainly nothing to be stricken out in that part of the answer.

The Court: He simply tells what he did.

Mr. Cunningham: Then the rest of it was "that is the only one I could make."

The Court: Strike that out.

Mr. Scoble:

"Q. And he was logged there on the ship's log as a deserter?

"A. Yes, and his pay was stopped from the time he was last seen aboard ship."

I move to strike out the answer.

The Court: I will exclude that.

Deposition of Schuyler F. Cumings marked Respondent's Exhibit C.)

Mr. Cunningham: I now offer in evidence the deposition [fol. 51] under notice on November 2, 1931, of Paul C. Nielsen, who was first assistant engineer of the steamship "American Shipper" during the year 1928, and also the deposition taken on February 19, 1931, of Ian S. Machardy, an oiler at that time on the steamship "American Shipper."

(Marked Respondent's Exhibit D.)

Mr. Cunningham: I offer also in evidence on behalf of the respondent the testimony taken by commission, issued out of this court, under date of January 2, 1929, and under order signed December 20, 1928, of Lowell C. Pinkerton, Consul General at London, England, and Daniel Miller, Vice-Consul. I am offering in evidence this commission, with the interrogatories and cross interrogatories and the answers and all exhibits thereto attached as received in due course under the commission.

Mr. Scoble: I would like to object to the seventh interrogatory in the deposition of Daniel Miller.

The Court: What is that?

Mr. Scoble:

"Q. What is your authority under the United States governing the discharge of seamen?"

I object to that as immaterial and calling for a conclusion, in that the statutes themselves are the best evidence.

The Court: Objection sustained.

(Marked Respondent's Exhibit E.)

Mr. Cunningham: The defendant rests.

[fol. 52] RESPONDENT'S EXHIBIT "C"—DEPOSITION OF SCHUYLER F. CUMINGS

IN UNITED STATES DISTRICT COURT

[Title omitted]

Deposition of Schuyler F. Cumings, Chief Shipkeeper, S. S. Leviathan, taken on behalf of the Respondent, United States of America, at the office of the United States Shipping Board, 45 Broadway, New York City, before John F. Frazer, Notary Public, pursuant to notice, on February 3, 1932, at 4 P. M.

Appearances:

George Z. Medalie, Esq., United States Attorney, for the Respondent, United States of America, by Frederick H. Cunningham, Esq., of Counsel.

John M. Scoble, Esq., Proctor for Libellant.

[fol. 53] It is stipulated that this deposition may be taken by a stenographer, signing, filing and certification being hereby waved, copy to be served on the proctor for the libellant, and stenographer's fees taxable as costs.

It is further stipulated that all objections except as to the form of the questions are reserved for the trial.

SCHUYLER F. CUMINGS, a witness called on behalf of the respondent after first being duly sworn, testified as follows:

Direct examination.

By Mr. Cunningham:

Q. Captain, what is your occupation?
A. Master mariner.
Q. How long have you been following the sea?
A. Since 1907. I was a cadet on a school ship then.
Q. What ship are you connected with at the present time?
A. At the present I am chief shipkeeper on the Steamship Leviathan.
Q. And prior to your connection with the Leviathan what ship were you connected with?
A. I was master of the Steamship President Harding.
Q. And prior to that what ship were you connected with?
A. I was master of the Steamship "American Shipper."
Q. Were you the master of the "American Shipper" [fol. 54] during the period from February 13, 1928, to February 26, 1928?
A. I was.
Q. And for some period longer?
A. Yes, sir.
Q. What was the length of your connection with that ship?
A. Close on to five years.
Q. How long were you connected with the "American Shipper" and between what dates?
A. Approximately five years; between March, 1924, and the first of April, 1930.
Q. Were you master during all that time?
A. I was master during all the time with the exception of short periods of maybe two months at a time when I was master of the American Merchant and master of the American Trader.
Q. Now, on the voyage which left New York February 16, 1928, enroute for London and return, do you remember a man by the name of Livingston H. McCrea being a member of the crew?
A. I do.
Q. What was his job?
A. Fireman.
Q. Where did he sign on?
A. At the port of New York.

Q. Did he sign on for the round voyage?

A. He signed on for the round voyage, yes.

Q. Did you ever have any trouble with McCrea on the voyage going over?

A. Not on the voyage going over.

Q. As far as his attention to duties and so forth are concerned you never personally had any trouble with him?

A. Not at all.

[fol. 55] Q. Nor did you have any complaint of any trouble with him, did you, as a matter of fact?

A. No, sir; no complaints either from him or against him.

Q. When the ship got to London did you see McCrea?

A. I did.

Q. State what happened at that time?

A. Well, while advancing pay due to the crew of the steamer "American Shipper" in the port of London on the day of arrival, McCrea demanded that he receive his full amount due him.

Q. Just a minute. On arrival how much pay is due the members of the crew?

A. One-half of what they have earned.

Q. That is, they are entitled to demand half of the wages earned up to date?

A. They are entitled to half of the wages up to date, yes.

Q. And when McCrea came along you say he demanded the full amount that was due him at that time?

A. The full amount he had earned at that time.

Q. Were there other members of the crew on the line at the time getting their allowances?

A. Yes, sir.

Q. And when he demanded the full amount due him at that time, what did you do?

A. I asked him his reason.

Q. What did he say?

A. He quoted Section 2 of the Seamen's Act, the Revised Statutes 4583, merely by their titles, so I told him he would have to see me at the American Consul's.

Q. Did you refuse to give him the amount of his demand?

[fol. 56] A. I refused him nothing at that time. I simply told him that he would have to see me at the American Consul's.

Q. At any rate you did not give him the amount which he demanded?

A. I did not give him anything. He would not accept half his pay.

Q. You told him he could have half?

A. I told him he could have half.

Q. Did he insist upon the full amount?

A. He just simply made no further argument about it. At that time he asked me the directions to the American Consulate, how to get there, and I told him. I gave him those directions.

Q. When you told him he could not have the total amount due at that time, what further did you tell him?

A. I told him to see me at the American Consul's.

Q. And you just said that you gave him directions how to reach there?

A. I gave him directions how to reach there, yes.

Q. Did you tell him when to meet you there?

A. I told him I would be there some time just after noon on Monday.

Q. Did this occur on a Sunday?

A. This occurred on a Sunday.

Q. Do you remember the date?

A. I cannot recall the exact date right now. Sunday was the day we arrived.

Mr. Cunningham: It is conceded that the ship arrived at London on February 26, 1928.

Mr. Scoble: Yes.

Q. The ship arrived on Sunday, did it not?

A. On a Sunday, yes.

[fol. 57] Q. The next morning, Monday, did you go to the American Consul's?

A. Not in the morning. I had the duty of preparing my papers for entry at the Customs House; and it was after I had entered at the Customs House that I proceeded to the Consulate.

Q. What time did you get there, about?

A. I could not tell you exactly, but it was before 2 o'clock in the afternoon.

Q. Had you told Mr. McCrea that you would be there at any specific hour?

A. Not at any specific hour. I told him I would not be there before noon, but that I would be there some time not long after noon.

Q. When you got there was he there?

A. He was not.

Q. Did you make any inquiries at the Consulate as to whether he had been there?

A. I did.

Q. And what was told you?

A. I was told that he had been there and that he had gone; that he had left.

Q. Who was it who told you that?

A. Mr. Miller.

Q. Who is Mr. Miller?

A. He is Vice-Consul in charge of the Marine Division.

Q. When you finished at the American Consulate that afternoon did you return to the ship?

A. I returned to the ship late. The time I finished at the Consulate and then proceeded down to our office, and had supper uptown, and got back aboard the ship along about 8 o'clock, I imagine.

[fol. 58] Q. Did you see Mr. McCrea yourself personally again at all?

A. Not again. I have never seen him to this day.

Q. So you had—what you just told us comprises all your dealings with him in reference to this matter of his request for full payment of his wages on arrival at the port of London?

A. That is true.

Q. Did he at the time of making the demand give any explanation of his demand whatever?

A. None at all.

Q. That is all he said, gave the reference to Section 2 of the Seamen's Act and so forth?

A. The titles.

Q. And the section of the Revised Statutes?

A. That is all.

Q. Had you had any complaint from him during the voyage?

A. None at all.

Q. Had any complaint been made to any of the officers of the Engine Department which in turn came to you?

A. None to my knowledge.

Q. Such complaints would come to you, would they not?

A. As a general rule, they would. I say, as a general

rule, because it is the policy of the engineers to bring any complaint like that to my attention.

Q. Of course, a complaint by a member of the engine force would be made to the chief engineer?

A. To the chief engineer.

Q. Do you remember when you sailed from London on the return trip?

A. On the return trip, if I recall properly, on a Friday night, the following Friday night after arrival.

[fol. 59] Q. And when the ship sailed did Mr. McCrea report for duty?

A. He did not.

Q. And you never saw him on the ship again?

A. I never saw him from the time he left the ship on Sunday. That is, I did not see him from the time he made his demand for full payment on Sunday.

Q. When you came back to New York, did you make a report of his not returning on the ship?

A. I had to report his absence from the crew.

Q. Your report was one of what?

A. One of desertion; that was the only one I could make for a man missing as he was.

Mr. Scoble: I want to expedite the hearing, but Mr. Cumings is offering the whole deposition in evidence, now. If I could put on the record an objection to two questions here.

The Court: Very well.

Mr. Scoble:

"Q. Your report was one of what?

"A. One of desertion; that was the only one I could make for a man missing as he was."

I move to strike out the answer.

The Court: All right, I will grant your motion.

Mr. Cunningham: Do you strike out his whole answer? His question was, "Your report was one——"

Mr. Scoble: "One of desertion."

Mr. Cunningham: There is certainly nothing to be stricken out in that part of the answer.

[fol. 60] The Court: He simply tells what he did.

Mr. Cunningham: Then the rest of it was "that is the only one I could make."

The Court: Strike that out.

Q. And he was logged there on the ship's log as a deserter?

A. Yes, and his pay was stopped from the time he was last seen aboard ship.

Mr. Scoble:

"Q. And he was logged there on the ship's log as a deserter?

"A. Yes, and his pay was stopped from the time he was last seen aboard ship."

I move to strike out the answer.

The Court: I will exclude that.

Q. Do you know whether McCrea left his clothing on board ship?

A. Yes, he did.

Q. Do you know what was done with his clothing when the ship arrived in New York?

A. It was turned over to the United States Shipping Commissioner.

Q. That was coincident with his being reported as a deserter to the United States Shipping Commissioner here?

A. Yes, sir.

Q. Did you go back to the American Consulate at all after this first appearance there by you on Monday?

A. Yes, sir.

Q. How many times?

A. Once after that.

Q. What day was that, do you remember?

A. That was a Friday, the morning or the day of sailing when I cleared and got my papers.

Q. Were you told whether or not Mr. McCrea had been back to the Consulate again?

[fol. 61] A. I am not certain, but it seems to me that I was told that he had been there or had sent a letter of complaint to the Consul, or had had some communication with the Consul.

Q. Were you on board the ship every day while the ship was in port?

A. Every day I was on board the ship while she was in port, sleeping aboard there every night.

Q. How late did you stay on board each morning?

A. Until after 10 o'clock.

Q. Were you there in the afternoon at all?

A. Very often. Some days I spent the whole day there.

Q. And, as you have already stated, you never saw Mr. McCrea again?

A. I never saw him again.

Q. Now, Captain, Mr. McCrea has brought an action against the United States of America, as owner of the vessel, claiming the amount of wages due him at the time of arrival in London, in the sum of $25.28; and also in addition a month's wages amounting to $65 above the wages mentioned as due, and the sum of $125 for expenses alleged to have been incurred by him for the purchase of passage back to New York from London, and also for the return of the clothing which he claims was wrongfully retained by the respondent, through the master or other officers, said claim being based on what he claims was a violation of law in reference to the way in which the watches were arranged on board the ship. He states that contrary to statute, the [fol. 62] watches both in the deck department and in the engine department were improperly arranged. He states that there were ten able seamen and two ordinary seamen on the vessel at the time. Can you state whether that statement is correct or not?

A. That statement is not correct.

Q. Why?

A. We had eleven able bodied seamen and two ordinary seamen.

Q. He states that contrary to the statutes these men were not equally divided into watches, but that six of the able seamen were placed on day work from eight to five daily; is that true?

A. I don't know what he refers to by day work. We had three men on each watch; and then we had a storekeeper; we had a yeoman, and we had another man.

Q. How were the watches divided?

A. The watches were four on and eight off.

Q. So that one watch was served from 12 to 4 and another one from 4 to 8?

A. Yes, sir.

Q. And a third watch?

A. From 8 to 12.

Q. How many men were on watch in the deck department on these respective watches mentioned?

A. There were three men.

Q. Mr. McCrea says, Captain, that these watches were made up of only two men on each watch, one of them being composed of an ordinary seaman and an able seaman; another of an ordinary seaman and an able seaman, and a third of two able seamen. You have just stated that there were three men on watch instead of two, as he alleges. [fol. 63] Will you explain that to us a little more, and state whether Mr. McCrea's figures are correct or not?

A. Mr. McCrea's figures are entirely wrong.

Q. What were these three men doing?

A. They were on lookout, two of them always on, one is a lookout, one has a station by the wheelman, and a third one performing various work and duties, deck duties about the deck.

Q. So that there were three men on watch?

A. Three men on watch.

Q. Regularly in each one of the watches?

A. Yes.

Q. Instead of two, as he claims?

A. Yes.

Q. One of these you state was a lookout?

A. Was a lookout.

Q. Now, Mr. McCrea, in his libel in paragraph 10th states that on arrival at London, because, as he says, of the failure to divide the able seamen and ordinary seamen in equal watches and the failure to divide the firemen, water tenders and oilers also in equal watches, he demanded his discharge from the vessel at the time of his arrival along with the payment of the wages then standing to his credit, and one month's additional pay. Having before you that statement which he sets forth in his libel, does that refresh your recollection about the time of his making his demand when the crew was getting their allowances which were due them on arrival in London?

A. I distinctly remember that he made no demands other than for his full pay, and quoted the names, that is, the [fol. 64] titles of the law that I have mentioned; and it was necessary for me after I got through advancing the money to go up and look up that law, look up those titles before I realized why he demanded that money.

Q. Did he say anything or make any demand for employment on board some other vessel?

A. He made no other demands through me other than that I should pay him the money he had earned up to that period.

Q. Mr. McCrea, in his libel in paragraph 13th, states that it was dangerous to operate the "American Shipper" as she was being operated in the matter of the arrangement of the watches as claimed by him, because it left the vessel without proper lookout and without adequate force to manage and maneuver the vessel, and that the vessel was therefore unseaworthy by reason of the failure to provide proper watches. What have you to say with respect to that allegation?

A. I say he is wrong.

Q. What do you mean when you say "wrong," wrong about what?

A. As to what constitutes the watches on board the ship, as he alleges we did not carry proper watches; we did; we had proper lookouts at all times, lookouts such as called for by law. We had men on the bridge there who were perfectly able and capable of performing their duties as required and maneuvering the ship at all hours of the day and night, and there was no danger, not a source of danger to navigation, and the ship was thoroughly seaworthy in every way and respect.

[fol. 65] Q. Did you in addition to those who were on the regular watches during the day time from 8 to 12 and 12 to 4 have any other than the three whom you have described as being on watch on duty in deck work?

A. Yes, sir.

Q. Will you tell us about them?

A. There was a carpenter; there was a boatswain; a seaman about decks there as a deck watchman, and performing his eight hours out of the twenty-four. There was a man performing various duties, including those of yeoman, during the time that he was performing his eight hours out of twenty-four; there was a man who had charge of the storerooms, keeping the various watches supplied with what materials they might need from the ship's stores and performing eight hours out of twenty-four.

Q. What can you say, Captain Cumings, in reference to this statement that six of the ten able seamen were placed on day work from eight to five the day after leaving port and continued as such until the arrival in London; were

these men he refers to those which you have just mentioned, or part of them?

A. He might have been mistaken, having seen men around deck. I don't know where he gets information from. I don't know what he is thinking of. We have men there. There are three men on a watch. There are three men on a watch, day time as well as night time. We also have other men. There is a boatswain, a carpenter, and as I have stated, three other seamen employed at different times about the decks.

[fol. 66] Q. These other seamen supplemented the watches which were going on at the time?

A. Yes, sir.

Q. And what were their general duties; were the general duties of these other men that of doing such work as is incidental to the navigation of the ship?

A. Incidental to the navigation of the ship, and to the cleanliness of the ship; necessary work in preparing to have the ship ready for entering a foreign port.

Q. Was this a passenger ship?

A. It was a passenger ship, yes.

Q. Did you have any complaint from any members of the crew in reference to the matter of the watches?

A. None at all.

Q. Did you have any complaints from any of the passengers with reference to the safety of the ship?

A. Never.

Q. I suppose, Captain, that you do not know of your own knowledge anything about what occurred between Mr. McCrea and the officials of the American Consulate at the times he was there?

A. No, because I was not present.

Q. Anything you know is simply hearsay?

A. Hearsay.

Q. Which came from your discussion with Mr. Miller?

A. With Mr. Miller.

Q. And Mr. Pinkerton?

A. Mr. Miller and Mr. Pinkerton.

Q. When you were at the Consulate on Monday, and also when you were off the ship on the other days during the week, who was left in charge of the ship?

A. The chief officer.

[fol. 67] Q. What was his name?

A. Eric Nelson.

Q. Is Mr. Nelson connected with the Leviathan?

A. No, sir.

Q. What ship is he connected with?

A. At the present time he is chief officer of the President Roosevelt.

Q. Do you know whether Mr. Eric Nelson is now in port or not?

A. I believe he is.

Q. What position did you say he held and on what ship?

A. Chief officer of the President Roosevelt.

Mr. Cunningham: I think that is all.

Cross-examination.

By Mr. Scoble:

Q. Captain, prior to the sailing from New York was your vessel inspected by the Steamboat Inspection Office, or any other inspection?

A. What was that question?

Q. Prior to the sailing of the "American Shipper" from New York on this voyage, was the vessel inspected by the Steamboat Inspection Office?

A. Of course, it has to be. You cannot sail without that inspection.

Q. Was any certificate issued?

A. She had a certificate, yes.

Q. Does that certificate describe how many men should be carried in the crew and in what capacity?

A. It does, yes.

Q. And does it state how many men are carried?

A. How many men are carried?

Q. Yes.

A. Not how many men are carried, it does not. It states how many men should be carried.

[fol. 68] Q. Do you know where that certificate is at the present time?

A. There is a record of it in the United States Steamboat Inspection Service.

Q. Now, you have stated that you carried, I think you said, eleven men?

A. Eleven able seamen.

Q. And two ordinary seamen?

A. Ordinary seamen.

Q. Is it not a fact that one of the able-bodied seamen was used in clerical duties all the time?

A. Not all the time.

Q. But at the time he was doing his watches he was used in clerical duties?

A. He was sometimes used for clerical duties, and sometimes used for other duties about the ship. These duties that he performed were duties incidental to the navigation of the ship.

Q. You have referred to five men who did special duty. Were those five men included in the thirteen men of the ship as ordinary seamen?

A. What five men are you referring to?

Q. Carpenter and yeoman, and those five different ones you spoke of.

A. The carpenter and the boatswain were not.

Q. Were the other three?

A. The other three were, yes.

Q. Did the three men who stood on watches at all times include any officer?

A. No.

Q. Was there a notice posted in the sailors and/or firemen's messroom directing certain sailors to work on day duty?

A. None that I know of.

[fol. 69] Q. Did you sign any such notice?

A. No.

Q. Was the whole or any part of the crew during said voyage needed for the maneuvering of the vessel or performance of work necessary for the safety of the crew of the vessel, or for the safety of life aboard another vessel, or for life boat, fire or other drills?

A. I don't understand your question.

(Question repeated.)

The Witness: Were they needed? I don't understand your question.

Mr. Scoble: All I am asking is whether any emergency ever came up by which it became necessary to do that on that voyage.

The Witness: There was no emergency. We held our fire and boat drills as called for by law.

Q. Was the assignment of able-bodied seamen or ordinary seamen to the various watches or to day duty entered in the log?

A. Was the assignment entered in the log book?

Q. Yes.

A. Not that I know of.

Q. Isn't it customary to enter into the log the assignment of each man who is on certain watch?

A. No; you enter in the log book the names of the lookouts.

Q. Do you enter in the log book any names of any men who are assigned to day duty?

A. No. The names of men performing routine work are never entered. The lookouts are entered.

Q. Was there any entry made in the log in relation to the [fol. 70] assignment of the men?

A. Merely the names of the lookout entered at the time they performed duty as lookouts.

Q. Who has possession of the log of the ship at this time?

A. The United States Lines, Inc.

Q. While the men were on watch did not one of them at various times have to call the next watch, and also get coffee for the officer on watch?

A. He had to call the next watch, his relief, and the relief of the others that were on duty at that time, but he never had to wait on the officers as personal servants of any character.

Q. When the "American Shipper" arrived in England was a list of the crew filed with the American Consul?

A. Yes.

Q. Do you know where that list is now; do they send it over here?

A. I could not tell you what their procedure is. I know that they call for a crew list there under Form 680, which we make out and they have filed, which we make out and deliver to them.

Q. Upon returning to New York, did you file a report of the McCrea case with any department or official here?

A. I made the usual log book entry in the Official Log Book, and reported down to the Customs House and to the United States Shipping Commissioner.

Q. Does that report contain the names of the crew?

A. Merely incidental to the McCrea case. It contains nothing else; no other reference.

Mr. Scoble: I think that is all.

[fol. 71] Redirect examination.

By Mr. Cunningham:

Q. Captain, will you for the purpose of the record describe the duties of the three men whom you have stated were always on watch during the regular watches?

A. One man is assigned to a lookout and is kept as far forward on board ship where he can see all around as it is possible to keep a man with safety, with relation to the safety of the man himself, another man is assigned to duty as a wheelsman, and on this ship his duties consist merely of watching the performance of the automatic helm which is used for steering on this ship to see that it is working properly at all times.

Q. Give the location on the ship?

A. This man, this wheelsman is at all times at his position; it is the same as a helmsman on a ship, this ship being equipped with a Gyro-Pilot.

Q. Whereabouts is the wheel?

A. On the bridge.

Q. Now, the third man?

A. A third man has general duties about the ship but always within call of the bridge. He is used as a relief lookout when necessary, as a relief helmsman, when necessary, or employed carrying messages from the bridge to the engine room or to the various parts of the ship as may be necessary in the performance of the safe navigation of the ship.

Q. And in general charge of all these men is an officer, is there not?

A. Yes, sir; a licensed officer.

[fol. 72] Q. Where is he stationed?

A. On the bridge.

Mr. Cunningham: That is all.

Examination concluded.

Respondent's Exhibit D—Deposition of Paul C. Nielsen

In United States District Court

[Title omitted]

Deposition of Paul C. Nielsen, a witness on behalf of the respondent, United States of America, taken, by consent,

at the office of the United States Shipping Board, 45 Broadway, New York City, on November 2, 1931, at 11 A. M., before Irvin Taber, Notary Public.

Appearances:

George Z. Medalie, Esq., United States Attorney, for the Respondent. Frederick H. Cunningham, Esq., of Counsel.

John M. Scoble, Esq., Proctor for Libellant.

[fol. 73] It is stipulated that the testimony may be taken by a stenographer and transcribed, signing, sealing, certification and filing being hereby waived; all objections, except as to form, to be reserved for the trial, and stenographer's fees to be taxable as costs.

Paul C. Nielsen, a witness on behalf of respondent, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Cunningham:

Q. Mr. Nielsen, please give your full name and address.

A. Paul C. Nielsen; permanent address, I have none; you can address me just to the office or to the ship—S. S. "American Shipper," Pier 4, Hoboken.

Q. Are you connected at the present time with the Steamship "American Shipper?"

A. Yes, sir.

Q. Did the "American Shipper" arrive in port on Saturday, the 31st of October?

A. October; yes, sir.

Q. When does it sail?

A. Eleven o'clock, Wednesday, November 4.

Q. That is, next Wednesday?

A. Yes, sir.

Q. In what department have you spent your time?

A. The engine department.

Q. What license do you hold?

A. Chief engineer, any gross tonnage.

Q. How long have you been going to sea?

A. Fourteen years.

Q. Were you connected with the Steamship "American Shipper" during the year 1928?

A. Yes, sir.

[fol. 74] Q. In what capacity?

A. First assistant engineer.

Q. Had you been connected with that ship prior to 1928?

A. Yes, sir.

Q. For how long?

A. From October, about the 20th, 1925.

Q. So you have been connected with the "American Shipper" continuously up to the present time since some time in 1925?

A. Yes, sir.

Q. What position did you hold in February, 1928?

A. February, 1928—first assistant engineer.

Q. And is that the position you hold at the present time?

A. No; chief engineer at the present time.

Q. Who was the chief engineer of the "American Shipper" in February, 1928?

A. W. O. Swatridge.

Q. Is Mr. Swatridge alive now?

A. No, sir; he died last March.

Q. And you succeeded him as chief engineer of the ship?

A. Yes, sir.

Q. Now, do you remember a voyage which began on or about February 15, 1928, sailing from New York, in which the libellant, Livingston H. McCrea, was one of the members of the crew connected with the engine department of the "American Shipper"?

A. Yes, sir.

Q. Did McCrea ever sail with you before that time?

A. No, sir.

Q. Has he ever sailed with you since that time?

A. No, sir.

[fol. 75] Q. What job did Mr. McCrea hold?

A. Fireman.

Q. What do you say as to his capacity and ability in the job which he had?

A. Satisfactory to me.

Q. He did whatever work he was called upon to do in a satisfactory manner?

A. Yes, sir.

Q. Did he complete the voyage or did he leave the ship when it arrived on the other side, at London?

Mr. Scoble: I object to the question as leading and calling for a conclusion.

Mr. Cunningham: Question withdrawn.

Q. Was McCrea with the ship when you returned to New York?

A. No, sir.

Q. Where did he leave the ship?

A. In London, England.

Q. Now, do you remember what the make-up or complement of the engine department was on this voyage?

A. The whole engine department entirely, or just the man——

Q. The question is do you remember?

A. Yes.

Q. How many engineers did you have?

A. Four.

Q. And they were what, respectively?

A. One chief, one first assistant engineer, one second, and one third assistant engineer.

Q. How many firemen did you have?

A. Six.

Q. How many motor tenders did you have?

A. Three.

[fol. 76] Q. How many oilers did you have?

A. Eight.

Q. Did you have a certificate of inspection on the ship?

A. Yes, sir.

Q. Do you know what the certificate of inspection called for as to the number of water tenders, firemen and oilers, respectively?

A. Yes, sir.

Q. What did it call for?

A. It called for three water tenders, six firemen, and three oilers.

Q. And you had, you say, three water tenders, six firemen and eight oilers?

A. Yes, sir.

Q. In other words, five oilers more than the number the certificate of inspection called for?

A. Yes, sir.

Q. Now, tell us how the water tenders were divided as to watches.

A. Well, they were divided into three watches, four hours on and eight off.

Q. And how were the water tenders divided, how many to each watch?

A. One to each watch.

Q. Now, how were the firemen divided as to these three watches?

A. Two firemen to each watch, equally divided into three watches.

Q. Now, how were the oilers divided as to these three watches?

A. One oiler on each watch in the main engine room, two oilers watch and watch with the refrigerating engineer.

Q. One on each watch?

A. One on each watch.

Q. With the refrigerating engineer?

A. Yes, in the refrigerating plant. Then, the other three [fol. 77] performed various duties in the engine room from 8 A. M. to 5 P. M., with one hour for lunch.

Q. Now, let us get this clear, Mr. Nielsen. Do I understand that these eight oilers were assigned to duty in this way: One oiler each on the eight to twelve watch, one on the twelve to four watch, and one on the four to eight watch?

A. Yes, sir.

Q. Then two of the remaining oilers were assigned to refrigerating duty?

A. Yes, sir.

Q. And there was, was there, a refrigerating engineer?

A. Yes, sir.

Q. And do I understand that the refrigerating engineer stood one watch?

A. Yes, sir.

Q. And the other two oilers stood the other two watches, respectively?

A. Yes, sir.

Q. So that there were three watches for the refrigerating engineer work?

A. Yes, sir.

Q. Then there were three other oilers left over?

A. Yes, sir.

Q. And those three oilers, as I understand it, were assigned to day work, standing on duty from 8 in the morning until 5 in the afternoon, with time off, of course, for lunch?

A. Yes, sir.

Q. And after that time those three oilers were off duty until the next morning?

A. Yes, sir.

Q. And what did those three men who did the day duty work at during the day?

A. Well, various performances in the engine room, repairs, cleaning, and what may occur, every-day performances in the engine room.

[fol. 78] Q. In other words, they were assigned to various duties which were necessary in the engine room in the operation of the engine in driving the ship?

A. Yes, sir.

Q. How many different departments are there generally to the running of a ship?

A. Well, three.

Q. What are the three main departments?

A. Deck department, steward department, and engine department.

Q. Do the men who are signed on for those respective departments devote themselves entirely to the work of those departments?

A. Yes, sir.

Q. Under certain conditions, as in emergencies, everybody can be called on to help; is that not so?

A. Yes, in emergency cases, yes.

Q. And that is a sea custom, is it not?

A. Yes; it is.

Q. Now, in addition to that, is there in the articles of the men when they sign on anything about their helping, particularly with reference to the mails?

A. Yes; there is a clause in the articles that the crew must assist in unloading mail and baggage.

Q. But outside of those two the work of the men is confined to the particular department in which they sign on?

A. Yes, sir.

Q. Now, those assigned to the deck department have to do generally with what kind of work?

A. Well, overhauling or cleaning, and so forth, the entire running of the deck department.

Q. The work, for example, of cleaning up the decks as it becomes necessary——

A. Yes.

[fol. 79] Q. —is for the deck department to take care of?

A. Yes.

Q. And the deck department, as I understand it, is composed of able seamen and ordinary seamen?

A. Able seamen, ordinary seamen, and boatswains.

Q. And over them are officers, the captain, the first, second and third mates; is that not so?

A. That's right.

Q. Now, do you assign, in connection with your duties, any of the engine room force to do work on the decks?

A. No; with the exception——

Q. State just what you have in mind.

A. Well, if it is a thing caused by my department or the engine department, I should say, why, I have done so.

Q. Now, in the course of the work of the engine department do you sometimes have an accumulation of waste, oil or refuse?

A. Yes.

Q. And what is done with that?

A. Taken up in a bucket on deck and thrown overboard.

Q. On the "American Shipper" was that the way which was provided to get rid of such refuse oil as accumulated from watch to watch?

A. Yes, sir.

Q. And at the end of a watch was this refuse oil disposed of in that way by that particular watch?

A. Yes, sir.

Q. Now, what occasionally happens, if anything, in dumping that refuse oil overboard?

A. Well, it occasionally happens that they go and dump it to the windward side, which they should not do.

[fol. 80] Q. And what happens when they do that?

A. It would blow back on the ship at times and spatter over the paint work, and so forth.

Q. In other words, oil dumped to windward is blown back on the deck and other parts of the structure at that level?

A. Yes.

Q. Does anybody else dump the oil except those of the engine force?

A. No, sir.

Q. So that when that thing happens who is to blame for the condition which results from its blowing back on deck?

A. Well, it would be the firemen.

Q. That is, whoever from the engine crew has done it?

A. Yes.

Q. And is that dumping done by the firemen or by the water tenders, or by the oilers?

A. By the firemen.

Q. By the firemen Now, when that occurs, Mr. Nielsen, what do you do with respect to cleaning up the muss?

A. Well, I have told them I would make them clean up if they made any muss that is unnecessary. I make the man off duty clean it up.

Q. The man off duty clean it up?

A. Yes.

Q. Under those conditions do you, as one of the engineers in charge, direct members of the engine crew to do that work, which takes them on deck?

A. Yes.

Q. Is there any other time when any of the engine force is called upon to do work which ordinarily would be the clean-up work of the able seamen or ordinary seamen?

A. No, sir.

[fol. 81] Q. Is the idea behind having the firemen clean up such a muss one in the nature of disciplinary action?

Mr. Scoble: I object to that as calling for a conclusion and leading.

Mr. Cunningham: You may answer it.

(Question read by the reporter.)

A. Yes, sir.

Q. How long does it take usually to clean it up?

A. Oh, fifteen minutes—ten, fifteen minutes—or twenty minutes, at the most.

Q. Of course, it would vary with the amount of muss that had been made?

A. Yes; it would vary, say, fifteen to twenty minutes at the most.

Q. Now, what did you have charge of as first assistant?

A. Four to 8 watch.

Q. What watch was Mr. McCrea on, if you remember?

A. Eight to 12 watch.

Q. Who had charge of the 8 to 12 watch?

A. The third assistant engineer.

Q. Now, do you remember an occasion while on this voyage where it became necessary to call upon the firemen to clean up a muss such as described?

A. Yes, sir.

Q. Do you remember just what date it was?

A. No; not exactly what date. I remember it was on the east-bound voyage; I couldn't say the exact date.

Q. Well, do you remember whether it happened more than once?

A. No; only once.

Q. Well, Mr. McCrea, in his libel, says that on or about the 22d day of February, 1928, the firemen of the 8 to 12 [fol. 82] watch were ordered to wash rails, bulkheads and booms on the after well deck. Would you say that it was about that date that this happened?

A. About then, yes.

Q. The ship sailing somewhere around the 15th or 16th of February, 1928?

A. Well, that would be about right. I could not vouch for the exact date.

Q. But you do remember, then, that it happened only once?

A. Yes.

Q. And that you did direct some firemen to clean up such a muss?

A. Yes, sir.

Q. Now, was Mr. McCrea one of those who was directed to clean up that muss?

A. No, sir.

Q. Why not?

A. Because he was on duty in the fire room.

Q. He then was on the 8 to 12 watch?

A. Yes, sir.

Q. And was not one of those called to clean up this muss, because he was on duty?

A. Yes, sir; that's right.

Q. What is the custom when a thing like this happens, as to who shall be called on to clean up such a muss?

A. Well, the guilty person.

Q. Do you find out usually who the guilty person was?

A. No, sir.

Q. In other words, the man who has dumped this to windward does not admit it as a rule, does he?

A. No, sir.

Q. As a matter of fact, did you ever know one to admit it?

A. Not yet; no, sir.

Q. And your experience runs through how many years?

A. Fourteen years.

[fol. 83] Q. So that since that is the case, what do you, as the engineer in charge, do?

A. Take all the fireroom crew that is off duty and make them clean it up.

Q. And some of those have just come off their watch?

A. Yes, sir.

Q. And some of them had been on the previous watch?

A. Yes, sir.

Q. And those are the ones that you call upon to clean up such a muss?

A. Yes, sir.

Q. As for those that are on the watch which is then running, like the 8 to 12 watch, are they ever directed to leave the engine room and go up and assist in such cleaning operation?

A. No, sir.

Q. Why not?

A. We couldn't; they are on duty; they would be absent from duty in the fire room.

Q. And if they were ordered out of the fire room, why, what would be the condition below?

A. Well, you just merely would not have a full crew in attendance at your fires or various duties.

Q. And the operation of running the ship, as far as the engine department is concerned, would be interfered with?

A. Yes.

Q. And is it necessary to have a complete complement of men down in the engine room in order to tend to the various duties?

A. Well, yes.

Q. How many fires were there down in the engine room of the "American Shipper," if you remember?

A. Twenty-four.

Q. So that if the firemen had been called up on deck to clean up the muss there would have been some twenty-four [fol. 84] fires left unattended?

A. Well, there is a water tender, as well as two firemen, in the fire room.

Q. The water tender's business hasn't anything to do with tending to the fires, has it?

A. Well, no; not tending to the fires.

Q. But he is competent to do it?

A. He is more than competent; he is there to see that the other men do it.

Q. As a matter of fact, a water tender ranks over the firemen, does he not?

A. Yes.

Q. How do you learn about this condition on deck which requires the cleaning up as you have been describing?

A. How do I learn about it?

Q. Yes?

A. Well, I am notified by the chief officer.

Q. That is, the chief mate?

A. The chief mate, yes.

Q. And on this occasion did the information come to you in that way?

A. Yes, sir.

Q. At the present time does the "American Shipper" still carry eight oilers, five beyond the number which is required by the certificate of inspection, United States Certificate of Inspection?

A. Yes, sir.

Q. Did McCrea leave the ship when you arrived at London?

A. Yes, sir.

Q. Do you know anything about the circumstances surrounding his leaving the ship?

A. No, sir; I do not.

Q. Was somebody put in his place after he left the ship on the return voyage?

[fol. 85] A. I am not positive of that; I would not like to commit myself; I am not positive whether there was a man put in his place or not.

Q. Well, he was a fireman?

A. He was a fireman, yes.

Q. You are required to have at least six firemen, are you not?

A. Yes.

Q. But you just don't remember——

A. (Interposing.) I don't remember; it is long ago.

Q. The log books would show?

A. My own records would show.

Q. Would the engine room log show that?

A. The engine room time books or the ship's official log would show it.

Q. Do you know whether or not he was logged as a deserter on his failure to return to the ship?

A. I do not; no.

Q. Of your own knowledge you know nothing about that?

A. No.

Q. But you simply do know that he did not return to the ship?

A. Yes.

Q. Do you know whether or not when he left the ship he took his clothes and belongings with him?

A. No; I don't know.

Q. Mr. Nielsen, is this custom which you have described, of having the firemen clean up a muss like this, one which is generally followed on the ships?

Mr. Scoble: I object to that as calling for a conclusion and as leading.

A. Well, did you say ships or ship?

Q. Well, on ships generally?

A. Yes.

[fol. 86] Q. And is it still followed on the "American Shipper?"

A. Yes.

Mr. Cunningham: I think that is all.

Cross-examination.

By Mr. Scoble:

Q. Mr. Nielsen, you have testified in relation to a certificate of inspection issued by the Steamboat Inspection Service. Have you a copy of such certificate?

A. No, no; there is one on the ship, framed.

Q. Is a duplicate copy of that certificate kept in the department?

A. I couldn't say; but it must be in the Customs Office, but I am not sure.

Mr. Cunningham: That is, a duplicate copy is on file?

The Witness: As far as I know, when the inspection is made, which is annually, they take up the old certificate, and when the inspection is made they send over a new certificate, and the old one is taken up; what happens to it after that, I don't know; but no doubt it is on file.

Q. With what department?

A. With the United States Steamboat Inspection Service.

Q. At the time you ordered the firemen up to clean the

decks was any entry made as to what men were ordered up on that date?

A. No, sir.

(Deposition concluded. Signature waived.)

[fol. 87] RESPONDENT'S EXHIBIT "D"—DEPOSITION OF IAN S. MACHARDY

IN UNITED STATES DISTRICT COURT

[Title omitted]

Deposition of Ian S. MacHardy, a witness on behalf of the respondent, United States of America, taken, by consent, at the office of the United States Shipping Board, 45 Broadway, New York City, on November 19, 1931, at 4 P. M., before Irvin Taber, Notary Public.

Appearances:

George Z. Medalie, Esq., United States Attorney, for the Respondent, Frederick H. Cunningham, Esq., of Counsel.
John M. Scoble, Esq., Proctor for Libellant.

It is stipulated that the testimony may be taken by a stenographer and transcribed, signing, sealing, certification and filing being hereby waived; all objections, except as to form, to be reserved for the trial, and stenographer's fees to be taxable as costs.

[fol. 88] IAN S. MACHARDY, a witness called on behalf of Respondent, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Cunningham:

Q. Mr. MacHardy, are you at the present time connected with the Steamship "American Trader", which arrived in port yesterday, November 18, 1931?

A. Yes, sir.

Q. What is your job on that ship?

A. Third assistant engineer.

Q. How long have you followed the sea?

A. Well, for the last fifteen years.

Q. Have you spent all your time in the Engine Department?

A. All my time in the Engine Department.

Q. Were you before you joined the American Trader connected with the Steamship "American Shipper", No. 28?

A. Yes, sir.

Q. Did you make a voyage on the "American Shipper" in the capacity of oiler, sailing from New York February 15, 1928?

A. Yes, sir.

Q. Did the ship go to London and return?

A. London and return.

Q. Did you make the entire trip?

A. Yes, sir.

Q. Do you remember a member of the crew in the Engine Department by the name of Livingston H. McCrea?

A. Yes.

Q. What was his job?

A. Fireman.

[fol. 89] Q. Do you remember another fireman by the name of McGuire?

A. Yes, sir.

Q. Were those two men, McCrea and McGuire, both on the same watch?

A. Yes.

Q. What watch was that?

A. Eight to twelve watch.

Q. You say you have followed the sea for fifteen years, all of which time has been spent in the Engine Department?

A. All of which time has been spent in the Engine Department.

Q. Now, in the work of the Engine Department does it become necessary usually at the end of each watch to dump oil which has accumulated?

A. Yes. In the fire rooms the fireman at the end of his watch mops up the web racks, and, naturally, there is some dirty oil in the bottom of the bucket, and it is usual for each one to dump it. Naturally, they take the easiest way and dump it over the side if nobody is looking.

Q. Then, it is an incident of the work in the engine room to dump waste oil at the close of perhaps every watch?

Mr. Scobel: I object to that as calling for a conclusion and as leading.

A. Yes; it is the custom at the end of the watch for each one to take up the mess of oil that they have made and to dump it overboard.

Q. Now, do the firemen do this work?

A. The fireman cleans the fire room and the oiler cleans the engine room.

Q. And who is it that dumps this waste oil?

A. Well, that is done by the fireman, because there is no oil in the engine room to dump.

[fol. 90] Q. And if they dump it on the aft end of the vessel it usually goes clear of the vessel?

A. Oh, naturally it goes clear.

Q. But if they dump it to windward what happens?

A. Well, it flows back on the ship and spatters beams and hand rails.

Q. Now, when this happens who cleans up the muss?

A. Well, if possible you try and find out who made the mess; but that is usually a very hard job.

Q. Why?

A. Well, it is carelessness, in the first place, and they just figure that nobody seen them and they get away with it.

Q. That is, the fireman who does it against orders—that is, who dumps the oil to windward—does not own up to it when asked by the assistant engineer; is that the idea?

A. No; I have never known them to do it. It is pretty natural at that.

Q. Now, as a result of that who are ordered to clean up that muss?

A. Well, when they can't get anybody to admit that they did it they usually go on the forecastle and take everybody and send them out to clean the mess.

Q. In other words, it is a sort of disciplinary measure to stop their being careless in dumping the oil?

Mr. Scoble: Objected to as leading.

A. Yes.

Q. Now, when a muss of this sort occurs in this way and the order is given to the firemen who are in the forecastle

to clean up the muss does that order include the men who [fol. 91] are on watch during that particular watch, or are the men who are at work down in the engine room on watch left there?

Mr. Scoble: I object to that as leading.

A. It has never been to my knowledge known to take men off watch to clean the mess; it is left to those who are actually off watch.

Q. What watch were you on?

A. I was on the eight to twelve watch.

Q. I think you have already testified that McCrea, the libellant herein, and a fellow named McGuire were the two firemen who were on that same watch?

A. Yes.

Q. Now, on that voyage do you remember any case when it became necessary to clean up such an oily muss caused by dumping oil?

A. I remember an occasion when there was oil spilled and a mess made, and I remember the first engineer trying to find out who had made the mess, and he could not.

Q. Was the first engineer the one who was in charge of the watch which is ahead of yours?

A. Yes; four to eight watch.

Q. And do you know whether he directed the firemen to clean this muss up?

A. On his watch I don't know, any of his orders on his watch.

Q. Well, was the muss cleaned up while you were on watch?

A. I did not actually witness the muss being cleaned up, but I know that it was cleaned up in the evening some time.

Q. That is, during the time that you were on watch?

A. Yes.

[fol. 92] Q. And during that time that you were on watch when this condition was reported were either McCrea or McGuire or you ordered to go up there and clean up?

A. I was not ordered up there to clean up, and to my knowledge I never heard the engineer order McCrea or McGuire up to clean up.

Q. Who else besides you and these two firemen comprised the watch, the eight to twelve watch?

A. The third assistant engineer and the water tender.

Q. So that on that watch down in the engine room there was the third assistant engineer, two firemen, one water tender and one oiler?

A. One oiler—right.

Q. And was that the regular make-up of the watches?

A. Yes; that is the standing watch; all watches.

Q. How many firemen did you carry on that voyage?

A. Six firemen.

Q. And how many water tenders?

A. Three water tenders.

Q. And how many oilers altogether?

A. Well, if I have to include——

Q. Include them all.

A. —refrigerating oilers, there is six oilers and two refrigerating oilers—eight oilers.

Q. Making eight in all?

A. Yes.

Q. And were two of those oilers assigned to the refrigerating work?

A. Oh, yes; they were on watch.

Q. So it left two on watch on the refrigerating work, [fol. 93] one oiler on each one of the regular watches?

A. Yes.

Q. And what became of the other three oilers?

A. They are at work all the time.

Q. From what to what?

A. Eight in the morning until five at night, with one hour for dinner, twelve to one.

Q. And the other men are stationed on regular watches of four hours on and eight hours off?

A. Four on and eight off.

Q. Did you at any time on this voyage ever see McCrea washing up the paint work or the beams or the rails of the after well deck?

A. At no time. I never seen McCrea participating in anything like that.

Q. Now, Mr. MacHardy, in the libel or complaint which Mr. McCrea has filed he makes this statement—he says:

"That on or about the 22nd day of February, 1928, during said voyage, all of the firemen on the 8 A. M. to 12 noon watch were ordered and compelled by the respondent, through the master or other superior officers of the said

vessel, "American Shipper," to go on deck to wash rails, bulkheads and beams on the after well deck, said firemen being necessarily absent from the fire room and their duties as firemen for a long period of time; that during the said period of time the duty of attending to twenty-four fires, as well as properly attending to water in the boilers, was left to one water tender."

[fol. 94] Now, do you remember any such condition as that occurring on the voyage while you were connected with the ship?

A. No. To my knowledge and from my own observation I never seen that; at no time did I see the fire room empty of firemen or clear of firemen.

Q. Now, what did your work as oiler call upon you to do?

A. My work as oiler called upon me to lubricate the different pumps in the engine room and to pump the bilges, which means that towards the end of the voyage I have to go in the fire room and open up the valves to pump the various bilges.

Q. So that your work as oiler would call you back and forth from the fire room to the engine room, and from the engine room to the fire room?

A. Yes.

Mr. Cunningham: I guess that is all.

Cross-examination.

By Mr. Scoble:

Q. Mr. MacHardy, how many voyages have you made since February, 1928?

A. I have been consistently employed ever since that date. I have been in the employ of the American Merchant line right up to the present. I served on the "American Shipper" until last year, and I served on the "American Banker" until last February, and I have served on the "American Trader" from April until the present date.

Q. How long does it take to go from New York to London?

A. New York to London, on an average, is ten days.

Q. How long does it take to make a round trip?

[fol. 95] A. A round trip—do you mean actual sailing time, or the period from signing on to signing off?

Q. Signing on to signing off.

A. Signing on to signing off is an average of twenty-eight days.

Q. How many trips do you make a year?

A. Well, I would have to look that up.

Q. Well, approximately.

A. Right offhand I should say nine—eight or nine trips.

Q. When did you first talk to anybody about this case?

A. The first I knew of this case was a man coming on board and asking if I saw McCrea—I could not say the date—I think it was—it was a short while after this occurrence happened—I could not say the date offhand, and I could not mention the month either, but as I remember it, it was shortly after that had happened.

Q. Where was that—in New York?

A. In New York. It was—I don't know—somebody—an investigator come aboard and asked if I saw McCrea, the oiler, and I was asked to make a statement then.

Q. At that time how many trips had you made subsequent to the time McCrea was on the ship?

A. How many trips on the "American Shipper"?

Q. Yes.

Mr. Cunningham: No; subsequent.

Q. Subsequent to the time that McCrea was on the ship.

A. Well, I would have to think, whether that was my first or second trip; I could not say offhand whether that was [fol. 96] my first trip or not; I would have to look up my record for that, which I could do; I have got every voyage since that date, since my first date; I could soon find out.

Q. Is there anything that impressed this trip on which McCrea was on your mind?

A. What do you mean—did McCrea impress himself on me?

Q. For any reason or anything that McCrea happened to do on the watch on that particular trip, did that make any impression on you?

A. No; I cannot say as there was anything noticeable to my knowledge. In fact, I think I would pass the man by; that is how much I knew him. Only the first few months you remember a man, but after a few years you forget faces.

By Mr. Cunningham:

Q. What is your present address?
A. 3820 Waldo avenue, near 238th street, Bronx.

Mr. Cunningham: That is all.
Mr. Scoble: That is all.

(Deposition concluded. Signature waived.)

[fol. 97] RESPONDENT'S EXHIBIT E—DEPOSITION OF LOWELL C. PINKERTON

IN UNITED STATES DISTRICT COURT

[Title omitted]

Direct Interrogatories Asked of and Answered by Lowell C. Pinkerton of London, England, a Witness on Behalf of Respondent, Pursuant to a Commission Issued in the United States District Court, Southern District of New York

1. Q. What is your full name?
A. Lowell Call Pinkerton.
2. Q. What is your address?
A. St. John's Wood Court, London, N. W., England.
3. Q. Are you connected officially with the American Consular Service located at #18 Cavendish Square, London, England, at the present time?
A. I am.
4. Q. If so, in what capacity?
A. As American Consul.
[fol. 98] 5. Q. Did you hold such position on February 27, 1928?
A. I did.
6. Q. Please state in general your duties, and in particular in respect to American seamen?
A. On February 27, 1928, I was acting as Executive Officer of the American Consulate General in London and, under the direction of the Consul General, assisted the officer in charge of the Shipping Department in the conduct of the business of that Department.
7. Q. What is the authority of the American Consular Service of #18 Cavendish Square, London, England, in

respect to American seamen and the matter of their discharge either on their own or the Master's application?

A. When application is made to the American Consulate General either by Master or a seaman for the discharge of a seaman, the Consular Officer is required to consider the application and determine whether or not the seaman is entitled under any of the laws or general maritime practice to such discharge. The authority for the action is contained in the Statutes of the United States and in general Maritime Law, as practised in the United States.

8. Q. In a case arising in the port of London, in which is situated a branch of the American Consular Service, has the Master of an American vessel the power to discharge a seamen without your approval i. e., the approval of the American Consul?

A. The Master has no such authority.

9. Q. What is the procedure in relation to discharging a seaman.

[fol. 99] A. The procedure in relation to discharge of a seaman varies dependant upon the reason for the discharge. The Statutes in some cases provide that a formal hearing shall be conducted to determine whether the claim is justified. However, usually the consular officer to whom application is made determines for himself whether such application may be approved.

10. Q. Must the discharge of a seaman be approved by you, i. e., by the American Consul?

A. The discharge of a seaman must be approved by a consular officer when the discharge is made abroad.

11. Q. Can the Master of a ship upon demand by a seaman to be paid off, on arrival at London, do so without referring the matter first to your office, i. e., the office of the American Consular Service?

A. No.

Q. (a) Why?

A. (a) Because a fine is provided if the Master fails to produce his crew upon the return to the United States but such penalty is not provided in case the Master can produce a list of those who have been discharged in a foreign country with the consent of a Consul or Vice-Consul there residing, certified under his hand and seal.

12. Q. Did Livingston H. McCrea, an American seaman of the crew of the Steamship "American Shipper," come to your office on February 27, 1928, and make a demand to

be paid off from said ship with wages in full, together with a month's extra wages and transportation back to the United States?

A. Yes.

[fol. 100] 13. Q. Did he see you personally on that day?

A. Yes.

14. Q. Were you acting in your official capacity?

A. Yes.

15. Q. On what did he base his demand?

A. As stated in his demand, he claimed discharge because certain men were assigned to duty in violation of Section 2 of the Seaman's Act of March 4, 1915, i. e., he claimed that certain men in the deck department were not assigned to watch.

16. Q. Please state in full detail what took place between you. (a) Did he see you first or some other attache of the Consulate, and if so, state who, if you know? (b) Please relate any conversation you had with McCrea, if any, in relation to his status in England, in the event of his failing to rejoin his ship before departure if the Consulate denied his application and claim.

A. (a) As I recall the interview, the man first saw Vice-Consul Miller and made his demand and Mr. Miller, believing the man not to be entitled to discharge and yet wishing further advice on the subject, spoke to me. (b) I then talked to McCrea and I believe that he was advised that he could not be discharged for any cause whatever in a British port without the consent of the British Immigration authorities. This consent would have to be obtained prior to discharge. I am not sure but I believe that he was also advised, in reply to a question from him, that if he failed to rejoin his ship, he would be subject to arrest and deportation by the British Immigration authorities as an [fol. 101] alien illegally in England.

17. Q. Did he present his demand orally or in writing?

A. He presented his demand first orally and then, at the suggestion of Vice-Consul Miller, in writing.

18. Q. If he presented his claim first, orally, did he thereafter file it at your request in written form under date of February 27, 1928?

A. He did.

19. Q. How many times did McCrea call at the Consulate's office and on what dates?

A. I only saw him the one time. He may have called prtviously or subsequently but I have no knowledge on that subject.

20. Q. What time was it when he called on February 27, 1928?

A. I do not remember.

21. Q. Was there a hearing? If so, at what hour?

A. There was no formal hearing.

22. Q. If not, what course or routine was followed?

A. Vice-Consul Miller and I discussed the application with McCrea orally and at that time consulted the Statutes and Regulation on the subject.

23. Q. Was McCrea alone at the time he came to the Consulate?

A. So far as I know, yes.

24. Q. Who was present, including representatives of the Consulate?

A. Vice Consul Miller, L. M. Hames, Clerk in the Consulate General, H. Garnham, Clerk in the Consulate General, and myself.

25. Q. Was a decision made at once on his claim, i. e., on the same day? If not, state when and whether orally or [fol. 102] in writing and if in writing how it was addressed?

A. A decision was made at once on his claim and he was advised orally. When he requested a statement in writing as to the decision, he was advised to make his request in writing and his letter would be answered. He made such request on February 29th, and a reply was sent to him on March 1st, addressed: "Mr. L. H. McCrea, Fireman, S. S. 'American Shipper,' Surrey Docks, London."

26. Q. Was Captain Cumings present at any time when McCrea was at your office?

A. I did not see Captain Cumings at any time while I was talking to McCrea.

27. Q. Did you or the American Consulate thereafter under date of February 29, 1928, receive a letter from McCrea submitting his claim again, but as a written one?

A. Yes.

28. Q. Was McCrea ordered by you to return to his ship?

A. According to my recollection, McCrea was advised that he could not be discharged, but I do not recall having ordered him to return to his ship. Mr. Miller may have given him such instructions.

29. Q. Did McCrea write you direct on February 29, 1928?

A. McCrea's letter of February 29, 1928, was addressed as follows: "Mr. Pinkerton, American Vice-Councillor, Cavendish Sq., London, England."

Q. (a) If you have answered the Twenty-Ninth Interrogatory in the affirmative, will you please attach a certified copy thereof to these answers, marking it Exhibit "B"?

[fol. 103] A. (a) Document produced by Witness, identified by him, and a certified copy thereof, marked Exhibit "B," signed by Witness and Commissioner is attached to the Commission.

30. Q. Did you see the written claim of February 27, 1928, referred to as Exhibit "A" at the time you talked with McCrea, if you, in reply to #16 (b) have answered that you did have a talk with him?

A. Yes.

Q. (a) Did McCrea write you direct under date of February 29, 1928? If so, please attach a certified copy of his letter to these answers as Exhibit "B."

A. (a) He did. See answer to interrogatory No. Twenty-nine (a).

31. Q. Did you personally answer it in writing passing on and deciding McCrea's claim or was the decision at the direction of the Consul General?

A. I did not personally reply to the letter but I saw the reply before it was forwarded. All correspondence is "at the direction of the Consul General."

32. Q. Did the decision therein reject or approve his claim?

A. The letter rejected his claim.

33. Q. Is it customary in cases of dispute bewteen a master and a seaman to hold formal hearings thereon?

A. In the case of certain disputes the Statutes and Consular Regulations provide for a formal hearing but no such provision is made in the Statute with regard to the violation of Section 2 of the Act of March 4, 1915.

[fol. 104] 34. Q. Was such a hearing demanded?

A. Not in my presence.

35. Q. Did McCrea visit the Consulate offices again after February 27, 1928? If so, when?

A. I only saw him on the one occasion. He may have visited the office again without my having seen him.

36. Q. What is the status of a seaman who leaves his ship without permission of the master or the American Consul? And allows it to sail without him?

A. A seaman who without cause leaves his ship without permission of the Master, or without having been formally discharged before an American consular officer and allows the ship to sail without him is either a straggler or a deserter, dependent on the circumstances under which he leaves the ship and whether he intends to return thereto.

37. Q. If the facts disclose that McCrea, having been notified of the sailing of his ship, and having had his claim rejected by the American Consul, wilfully failed and refused to rejoin his ship, was his status that of "deserter"?

A. Under the Consular Regulations if a seaman wilfully leaves his ship without cause and with intent not again to return thereto, he is regarded as a deserter.

38. Q. Assuming the facts as set forth in the Thirty-Seventh Interrogatory, state whether under such conditions McCrea was proper subject of arrest pending deportation, pursuant to the English Immigration Law as it existed on March 2, 1928?

A. Yes.

[fol. 105] 39. Q. Was Captain Cumings, Master of the Steamship "American Shipper," at the Consulate offices on February 27, 1928, either before or after McCrea was there?

A. I did not see him.

40. Q. Was Captain Cumings there subsequently between February 27, 1928, and March 2, 1928, the date his vessel sailed?

A. I did not see him.

IN UNITED STATES DISTRICT COURT

[Title omitted]

Cross-Interrogatories Asked of and Answered by Lowell C. Pinkerton of London, England, a Witness on Behalf of the Respondent, Pursuant to a Commission Issued in the United States District Court, Southern District of New York

1. Q. If you have answered the 12th interrogatory herein in the affirmative, please state whether at the time of said

[fol. 106] demand you had read and were familiar with Section II of the Act of March 4th, 1915, chapter 153 of the Laws of the United States, being 38 Stat. 1164, relating to requirements as to watches, duties of seamen, right to discharge; and other matters.

A. I was familiar with it and also read it again in McCrea's presence.

2. Q. If you have answered the 12th Interrogatory in the affirmative, please state whether at the time of said demand you had read and were familiar with the decision of the Supreme Court of the United States, in the case of O'Hara and Tjerland vs. Luckenbach Steamship Company, 269 U. S. 364.

A. I have not read the decision but it may have been incorporatel in the Consular Regulations which are issued by the Department of State for the guidance of consular officers in their duties toward seamen.

3. Q. If you have answered the 12th Interrogatory in the affirmative, please state whether at the time of said demand you had read and were familiar with Section 4583 of the Revised Statutes of the United States.

A. Yes.

4. Q. If you have answered the 12th Interrogatory in the affirmative, state fully all conversation between yourself and Livingston H. McCrea, on the 27th day of February, 1928, or any subsequent date, respecting the law governing his said demand.

A. All that I recall with regard to the interview is contained in the answer to the sixteenth direct interrogatory.

[fol. 107] 5. Q. Did you discuss at the time or times mentioned in the last previous Cross Interrogatory, with said McCrea, the applicability to his said demand of the decision of the Supreme Court of the United States in O'Hara and Tjerland vs. Luckenbach Steamship Company, 269 U. S. 364.

A. So far as I recall it, it was not mentioned.

6. Q. Was it your opinion and conclusion that the decision of the Court in O'Hara and Tjerland vs. Luckenbach Steamship, did not apply to the case presented by the demand of said Livingston H. McCrea, for the reason that said Livingston H. McCrea was a fireman, while in the O'Hara case mentioned the demand was made by a seaman on the ground that the seamen were not properly divided into watches.

A. As stated in reply to the previous Cross Interrogatory, I do not recall that the Supreme Court decision was mentioned. However, McCrea stated to Mr. Miller and Mr. Miller informed me that McCrea himself was affected in no way by the action of the Master in the distribution of his crew, that he himself was assigned to watches, and it was thought that he, therefore, had no right to complain or demand discharge under the Statute mentioned since it did not affect him or his work in any way.

7. Q. State fully all that you said to the said Livingston H. McCrea, if anything, respecting the applicability of the decision of the Court in the said O'Hara Case, to the said demand made by the said Livingston H. McCrea.

[fol. 108] A. As stated before, I do not recall that the Court decision was mentioned in my presence.

8. Q. If you have testified to previous interrogatories, direct or cross, that the said Livingston H. McCrea made demand to be paid off from said Steamship "American Shipper," his wages in full, together with a month's extra wages and transportation back to the United States, state fully whether you ever communicated in writing with said Livingston H. McCrea in response to such demand.

A. I did.

9. Q. If you have answered the last preceding cross interrogatory in the affirmative, then attach such communication, or a true copy thereof, to your deposition herein, and mark the same "Libellant's Exhibit I."

A. Communication produced by Witness, identified by him, and certified copy thereof, marked "Libellant Exhibit I," signed by witness and Commissioner, is attached to the Commission.

10. Q. If you have testified in response to previous interrogatories, direct or cross, that the said Livingston H. McCrea made demand to be paid off from said steamship "American Shipper" with his wages in full, together with a month's extra wages in full, together with transportation back to the United States, state whether or not you or any other person connected with the American Consular Service, examined or caused to be examined, the log of the Steamship "American Shipper," for the voyage referred to in said demand, from the 15th day of February to the [fol. 109] 27th day of February, 1928, or any subsequent date, in relation to said demand.

A. I did not examine the log nor did anyone else at my direction examine the log. Whether or not the log was actually examined I cannot say.

11. Q. Was the said log of the Steamship "American Shipper" from the 5th day of February, 1928, to the 27th day of February, 1928, or any subsequent date, exhibited to you or to your knowledge to Daniel Miller, or any other person connected with the American Consular Office?

A. It was not exhibited to me nor, to my knowledge was it exhibited to anyone else in the office.

12. Q. If you have answered cross interrogatories ten or eleven in the affirmative, state whether or not you have made any copy of said log or memoranda as to its contents.

A. My reply was in the negative.

13. Q. If you have answered the last preceding cross interrogatory in the affirmative, then attach said copy of said log or any memoranda you made in relation thereto, or a true copy thereof, to your deposition herein and mark the same "Libellant's Exhibit II."

A. My reply was in the negative.

14. Q. If you have answered Cross Interrogatory ten or eleven in the negative, state whether or not you called for or requested that the log of the Steamship "American Shipper," from the 15th day of February to the 27th of February or any later date exhibited to you or any other official in the United States Consular Office.

A. I do not know.

[fol. 110] 15. Q. Have you received any letter or written communication from any attorney or representative of the United States, or Edgar Wandless, counsel and proctor for respondent, or representative of his or other person, respecting your testimony herein, or any answer which you might give to any question herein propounded to you?

A. No.

16. Q. Have you received any oral communication from anyone respecting your testimony herein, or your answers to any question which might be propounded to you herein?

A. No.

17. Q. If you have answered the 15th Cross Interrogatory in the affirmative, then attach to your deposition herein such writing, or a true copy thereof, and mark the same "Libellant's Exhibit III."

A. My reply was in the negative.

18. Q. If you have answered the 16th Cross Interrogatory in the affirmative then state the names of any and all persons from whom such oral communication or communications have been received by you, and the substance thereof.

A. My reply was in the negative.

[fol. 111] RESPONDENT'S EXHIBIT "E"—DEPOSITION OF DANIEL MILLER

IN UNITED STATES DISTRICT COURT

[Title omitted]

Direct Interrogatories Asked of and Answered by Daniel Miller, of London, England, a Witness on Behalf of Respondent, Pursuant to a Commission Issued in the United States District Court, Southern District of New York

1. Q. What is your full name?

A. Daniel Miller.

2. Q. What is your address?

A. 25 Coniger Road, Parson's Green, London England.

3. Q. Are you connected officially with the American Consular Service located at #18 Cavendish Square, London, England, at the present time?

A. Yes.

4. Q. If so, in what capacity?

A. American Vice Consul.

5. Q. Did you hold such position on February 27, 1928?

A. Yes.

[fol. 112] 6. Q. If in reply to Interrogatory #3, you have replied in the affirmative, please state in general your duties in respect to American seamen.

A. Duties in respect to American seamen are as set forth in the Consular Regulations, and Instructions from the Department of State.

7. Q. What is your authority under the United States Statutes governing the discharge of seamen?

Mr. Scoble: I would like to object to the seventh interrogatory in the deposition of Daniel Miller.

The Court: What is that?

Mr. Scoble: "Q. What is your authority under the United States governing the discharge of seamen?" I object to that as immaterial and calling for a conclusion, in that the statutes themselves are the best evidence.

The Court: Objection sustained.

8. Q. In a case arising in the Port of London, in which is situated a branch of the American Consular Service, has the Master of an American vessel the power to discharge a seaman without your approval, i. e., the approval of the American Consul?

A. No.

9. Q. What is the procedure in relation to discharging a seaman?

A. When application for discharge has been made, the procedure followed depends on the circumstances. In some cases, formal hearings are provided under the Statutes. In mose cases, the consular officer can decide whether or [fol. 113] not the application should be approved.

10. Q. Must the discharge of a seaman be approved by you, i e., by the American Consul?

A. Yes.

11. Q. Can the Master of a ship upon demand by a seaman to be paid off, on arrival at London do so without referring the matter first to your office, i. e., the office of the American Consular Service? (a) Why?

A. A Master cannot lawfully discharge a seaman in a foreign port without the intervention of the consular officer. Section 4576 of the Revised Statutes, as amended by Section 3 of the Act of March 3, 1897, provides as follows:

Navigation Laws of the United States, 1927, under Part V., Merchant Seamen, on page 46:

Failure to Produce Crew

The Master of every vessel bound on a foreign voyage or engaged in the whale fishery shall exhibit the certified copy of the list of the crew to the first boarding officer at the first port in the United States at which he shall arrive on his return, and also produce the persons named therein to the boarding officer, whose duty it shall be to examine the men with such list and to report the same to the collector; and it shall be the duty of the collector at the port of arrival,

where the same is different from the port from which the vessel originally sailed, to transmit a copy of the list so [fol. 114] reported to him to the collector of the port from which such vessel originally sailed. For each failure to produce any person on the certified copy of the list of the crew the master and owner shall be severally liable to a penalty of four hundred dollars, to be sued for, prosecuted, and disposed of in such manner as penalties and forfeitures which may be incurred for offenses against the laws relating to the collection of duties; but such penalties shall not be incurred on account of the master not producing to the first boarding officer any of the persons contained in the list who may have been discharged in a foreign country with the consent of the consul or vice consul there residing, certified in writing, under his hand and official seal, to be produced to the collector with the other persons composing the crew, nor on account of any such person dying or absconding or being forcibly impressed into other service of which satisfactory proof shall also be exhibited to the collector (R. S. 4576; Mar. 3, 1897, sec. 3.)

12. Q. Did Livingston H. McCrea, an American seaman of the crew of the Steamship "American Shipper" come to your office on February 27, 1928, and make a demand to be paid off from said ship with wages in full, together with a month's extra wages and transportation back to the United States?

A. Yes.

13. Q. Did he see you personally on that day?

A. Yes.

[fol. 115] 14. Q. Were you acting in your official capacity?

A. Yes.

15. Q. On what did he base his demand?

A. He alleged that certain men had been assigned to duty in violation of Section 2, of the Seamen's Act of March 4, 1915, and claimed discharge, wages in full, and also one month's extra wages and transportation back to the United States, under Section 4583 of the Revised Statutes, as amended by Section 18 of the Act of December 21, 1898.

16. Q. Please state in full detail what took place between you?

A. McCrea stated his claim. I said I did not think he was entitled to discharge but suggested he make a formal

claim in writing and that I would then obtain advice on the matter. This was done.

17. Q. Did he present his demand orally or in writing?

A. Orally first, and in writing afterwards.

18. Q. If he presented his claim first, orally, did he thereafter file it at your request in written form under date of February 27, 1928?

A. Yes.

19. Q. If you have answered the Eighteenth Interrogatory in the affirmative, will you please attach to the answers hereto, a certified copy of the same, marking it Exhibit "A"?

A. I attach a certified copy of McCrea's affidavit, dated February 27, 1928.

Document produced by Witness, identified by him, and a certified copy thereof, marked Exhibit "A", signed by [fol. 116] Witness and Commissioner is attached to the Commission.

20. Q. How many times did McCrea call at the Consulate's Office and on what dates?

A. Only once, on February 27, 1928.

21. Q. What time was it when he called on February 27, 1928?

A. About 10 a. m.

22. Q. Was there a hearing? If so, at what hour?

A. No.

23. Q. If not, what course or routine was followed?

A. McCrea's claim was discussed with him orally by Consul Pinkerton and myself.

24. Q. Was McCrea alone at the time he came to the Consulate?

A. Yes.

25. Q. Who was present, including representatives of the Consulate?

A. Consul Pinkerton, L. M. Hames and H. Garnham, clerks in the Consulate General and myself.

26. Q. Was a decision made at once on his claim, i. e., on the same day? If not, state when and whether orally or in writing and if in writing how it was addressed?

A. A decision was made on McCrea's claim orally at once, i. e., on February 27, 1928. This decision was subsequently given in writing under date of March 1, 1928,

and was addressed as follows: "Mr. L. H. McCrea, Fireman, s.s. 'American Shipper' Surrey Docks, London."

27. Q. Was Captain Cummings present at any time when McCrea was at your office?

A. No.

28. Q. Did you or the American Consulate thereafter under date of February 29, 1928, receive a letter from McCrea submitting his claim again, but as a written one?

A. Yes.

[fol. 117] 29. Q. If you have answered the Twenty-eighth Interrogatory in the affirmative, will you please attach a certified copy thereof to these answers, marking it Exhibit "B"?

A. Document produced by witness, identified by him, and a certified copy thereof, marked Exhibit "B", signed by Witness and Commissioner, is attached to the Commission.

30. Q. Did you personally answer it in writing passing on and deciding McCrea's claim or was the decision at the direction of the Consul General?

A. Yes, I personally drafted the letter dated March 1, 1928, passing on and deciding McCrea's claim. The letter was, however, discussed personally with Consul Pinkerton. Also since all action of this Consulate General is under the responsibility of the Consul General, the letter was at his direction, as is all official correspondence of the office.

31. Q. Did the decision therein reject or approve his claim?

A. The letter rejected the claim.

32. Q. If you answered the Thirtieth Interrogatory in the affirmative, state when you answered it and to what address you sent your answer, together with date.

A. I answered McCrea's letter, dated February 29, 1928, on March 1, 1928. The answer was sent to the following address: "Mr. L. H. McCrea, Fireman, s. s. 'American Shipper,' Surrey Docks, London." It was handed to Captain Cummings on March 2, 1928, when he came to the Consulate General to clear his ship, for delivery to McCrea. [fol. 118] It was not delivered, and was afterwards returned to the Consulate General.

33. Q. If you have answered the Thirtieth and Thirty-second Interrogatories in the affirmative, please attach a

certified copy of the letter answering it, to these answers marking it Exhibit "C".

A. Document produced by Witness, identified by him, and a certified copy thereof, marked Exhibit "C", signed by Witness and Commissioner, is attached to the commission.

34. Q. If you found that McCrea was not entitled to the discharge sought, state the reasons therefor.

A. At the time McCrea made his claim, on February 27, 1928, he was informed that he could not be discharged here without the permission of the British immigration authorities. He stated in response to an inquiry that he had not applied for such permission, and, in any case, the British immigration authorities would not have given him the permission without a guarantee from this Consulate General to maintain and repatriate him. Such guarantee could only have been furnished by the Consulate General in the event that it was found that McCrea was entitled to the discharge sought.

It was in fact found that McCrea was not entitled to the discharge sought. The reasons were as follows:

In the first place, McCrea was not himself either directly or adversely affected by the alleged violation of Section 2 of the Seamen's Act of March 4, 1915. He stated in response to an inquiry that he had no complaint to make in [fol. 119] regard to the work to which he had been assigned during the voyage, or to the treatment he had received. He further stated that he was making his claim as a matter of principle. I then suggested he wait until the vessel returned to New York and make his complaint to the United States Shipping Commissioner there, but he refused to consider this suggestion.

In the second place, the "American Shipper" was on the voyage in question carrying sixty-eight men, as against the fifty-eight men prescribed in the Register. It was, therefore assumed that the master, being thus able to dispose of the services of ten extra men, had for all practical purposes complied with the provisions of Section 2 of the Seamen's Act of March 4, 1915, and that the violation, if any, was purely technical, and should properly be left for consideration by the United States Shipping Commissioner at New York following the completion of the voyage.

In the third place, I did not consider that the alleged violation of Section 2 of the Seamen's Act of March 4, 1915, was of a nature sufficiently serious to justify the discharge of a member of the crew with arrears of wages, one month's extra wages, and transportation back to the United States. McCrea's discharge under these conditions would have automatically entitled all the other members of the crew to discharge under the same conditions, and might thus have resulted in delaying or preventing the vessel's sailing. It was not considered that the alleged violation at all war- [fol. 120] ranted running the risk of such possible delay or prevention of sailing.

As indicative of the degree of importance to be attached to the alleged violation, it was considered significant that at the time McCrea came to the Consulate General and made his claim, he was not accompanied by any other member of the crew, in particular by any member of the crew stated by him to have been assigned to duty contrary to the provisions of Section 2 of the Seamen's Act of March 4, 1915.

35. Q. Is it customary in cases of dispute between a Master and a seaman to hold formal hearings thereon?

A. No.

36. Q. Was such a hearing demanded?

A. No.

37. Q. Did McCrea visit the Consulate offices again after February 27, 1928? If so, when?

A. Not to my knowledge.

38. Q. What is the status of a seaman who leaves his ship without permission of the Master or the American Consul? And allows it to sail without him?

A. He may be either a straggler or a deserter, according to the circumstances.

39. Q. If the facts disclose that McCrea, having been notified of the sailing date of his ship, and having had his claim rejected by the American Consul, wilfully failed and refused to rejoin his ship, was his status that of "deserter"?

A. Yes.

40. Q. Assuming the facts as set forth in the Thirty-ninth Interrogatory, state whether under such conditions McCrea [fol. 121] was proper subject of arrest pending deportation, pursuant to the English Immigration Law as it existed on March 2, 1928?

A. Yes.

41. Q. Was Captain Cummings, Master of the Steamship "American Shipper," at the Consulate Offices on February 27, 1928, either before or after McCrea was there?

A. Yes; Captain Cummings was at the Consulate General and entered his vessel on February 27, 1928, about an hour before McCrea had left.

42. Q. Was Captain Cummings there subsequently between February 27, 1928, and March 2, 1928, the date his vessel sailed?

A. Yes; Captain Cummings was at the Consulate General on March 2, 1928, and cleared his vessel, which sailed on that date.

[fol. 122] In United States District Court

[Title omitted]

Cross Interrogatories Asked of and Answered by Daniel Miller of London, England, a Witness on Behalf of the Respondent, Pursuant to a Commission Issued in the United States District Court, Southern District of New York

1. Q. If in answer to the 12th interrogatory herein, you have stated that Livingston H. McCrea, an American seaman of the crew of the steamship "American Shipper," came to your office on or about February 27th, 1928, and made a demand to be paid off from said ship with wages in full, together with a month's extra wages and transportation back to the United States, or other demand, please state whether at that time you had read and were familiar with Section II of the Act of March 4th, 1915, chapter 153 [fol. 123] of the Laws of the United States, being 38 Stat. 1164, relating to requirements as to watches, duties of seamen, right to discharge, and other matters.

A. Yes.

2. Q. If in answer to the 12th Interrogatory you have stated that Livingston H. McCrea, an American seaman of the crew of the steamship "American Shipper," came to your office on or about the 27th day of February, 1928, and made a demand to be paid off from said ship with wages in full, together with a month's extra wages and transpor-

tation back to the United States, or other demand, had you at that time read and were you familiar with the decision of the Supreme Court of the United States, in the case of O'Hara and Tjerland vs. Luckenbach Steamship Company, 269 U. S. 364.

A. No.

3. Q. If in answer to the 12th Interrogatory you have stated that Livingston H. McCrea, an American seaman of the crew of the steamship "American Shipper," came to your office on or about the 27th day of February, 1928, and made a demand to be paid off from said ship with wages in full, together with a month's extra wages and transportation back to the United States, or other demand, had you at that time read and were you familiar with Sec. 4583 of the Revised Statutes of the United States?

A. Yes.

4. Q. If you have stated in answer to previous Interrogatories, direct or cross, that said Livingston H. McCrea on the 27th day of February, 1928, made demand to be paid [fol. 124] off from said steamship "American Shipper," then state fully all conversation between yourself and said Livingston H. McCrea on February 27th, 1928, or any subsequent date, respecting the law governing his said demand.

A. Certain parts of the conversation between McCrea and myself are stated in answer to other of these interrogatories, direct and cross. Further than this, my own share in the conversation was almost altogether concerned with two things. First, with trying to induce McCrea to complete the voyage in accordance with his agreement under the articles and to make his complaint to the United States Commissioner on arrival at New York. Second, when McCrea refused to complete the voyage, with maintaining the position that the alleged violation of Section 2 of the Seamen's Act of March 4, 1915, was not of a nature sufficiently serious to justify allowing his claim and thus setting a precedent which might result in paying off an entire ship's crew, with one month's extra wages and transportation back to the United States, and in tying-up a United States Shipping Board vessel.

5. Q. Did you discuss at the time or times mentioned in the last previous Cross Interrogatory, with said McCrea the applicability to his said demand of the decision of the

Supreme Court of the United States, in O'Hara Tjerland vs. Luckenbach Steamship Company, 269 U. S. 364?

A. No; McCrea mentioned in connection with his demand the decision of the Supreme Court of the United States [fol. 125] in the case of O'Hara and Tjerland vs. Luckenbach Steamship Company, but I did not discuss the applicability of the decision to his demand.

6. Q. Was it your opinion and conclusion that the decision of the Court in O'Hara and Tjerland vs. Luckenbach Steamship Company, did not apply to the case presented by the demand of said Livingston H. McCrea for the reason that said Livingston H. McCrea was a fireman, while in the O'Hara Case mentioned the demand was made by seamen, on the ground that the seamen were not properly divided into watches?

A. I did not form an opinion and reach a conclusion as to whether the decision of the Court in O'Hara and Tjerland vs. Luckenbach Steamship Company did or did not apply to the case presented by McCrea's demand.

7. Q. State fully all that you said to the said Livingston H. McCrea, if anything, respecting applicability of the decision of the Court in the said O'Hara case, to the said demand made by the said Livingston H. McCrea.

A. I told McCrea I was not particularly concerned with the decision of the Court in O'Hara and Tjerland vs. Luckenbach Steamship Company, since I was prepared to reject his claim on other grounds.

8. Q. If you have testified to previous interrogatories, direct or cross, that the said Livingston H. McCrea, made demand to be paid off from said Steamship "American Shipper," his wages in full, together with a month's extra wages and transportation back to the United States, state [fol. 126] fully whether you ever communicated in writing with said Livingston H. McCrea in response to such demand.

A. Yes: on March 1, 1928.

9. Q. If you have answered the last preceding Cross Interrogatory in the affirmative, then attach such communication, or a true copy thereof, to your deposition herein, and mark the same "Libellant's Exhibit I."

A. Document produced by Witness, identified by him, and a certified copy thereof, marked Libellant's Exhibit "I",

signed by Witness and Commissioner, is attached to the commission.

10. Q. Was any record in writing kept by you or by the American Consular Service, in London, England, of the demand if any, made by Livingston H. McCrea, American seaman, of the crew of the Steamship "American Shipper," made on or about the 27th day of February, 1928, to be paid off from said ship with wages in full, together with a month's extra wages and transportation back to the United States, or other demand, and the proceedings taken thereon?

A. Yes.

11. Q. If you have answered the last preceding Cross Interrogatory in the affirmative, then attach to your deposition herein a true copy of the record of said demand and proceedings thereon, and each and every part thereof, and mark the same "Libellant's Exhibit II."

A. Documents produced by Witness, identified by him, and certified copies thereof, marked Libellant's Exhibit "II", signed by Witness and Commissioner, are attached to the Commission.

[fol. 127] 12. Q. If you have answered the 10th Cross Interrogatory in the negative, then state whether it was customary in the office of the American Consular Service of London, England, on and prior to the 27th day of February, 1928, to make no written record of the demands, if any, made by American seamen, and the proceedings thereon, for discharge from their ships, with a month's extra wages and transportation back to the United States.

A. No answer.

13. Q. If in answer to preceding Interrogatories, direct and cross, you have assumed to state the procedure in relation to discharging a seaman, then state whether or not such procedure is prescribed by statute or written rules or regulations?

A. Yes; the procedure in relation to discharging a seaman is prescribed by statute and/or written rules or regulations.

14. Q. If in answer to the last preceding Cross Interrogatory you have stated that the procedure in relation to discharging a seaman is governed, by statute and/or written rules and regulations, then attach to your deposition a copy of such written rules or regulations, and refer spe-

cifically to the statutory provision which you rely on as governing such procedure, and mark whatever is so attached "Libellant's Exhibit III."

A. I am unable to refer specifically to the statutory provision relied on as governing the procedure in relation to discharging a seaman. It is also impracticable to attach to this deposition a copy of the written rules and regula-
[fol. 128] tions. These are contained in the Department of Commerce publication entitled Navigation Laws of the United States and in the Consular Regulations, to which reference is made and of which copies are doubtless available.

15. Q. If you have answered the 10th Direct Interrogatory in the affirmative, then attach any rule or regulation, and refer specifically to any provision of the Statute, upon which you relied in making such answer and mark the matter attached "Libellant's Exhibit IV."

A. Certified copy of extract produced marked Libellant's Exhibit "IV", signed by Witness and Commissioner, and attached to the Commission.

16. Q. If you have answered the 40th Direct Interrogatory in the affirmative, then attach to your deposition a copy of the English Immigration Law, or other law, or the part thereof relied on by you in making such answer, and mark the same "Libellant's Exhibit V".

A. Document produced by Witness identified by him, and a certified copy thereof, marked Libellant's Exhibit "V", signed by Witness and Commissioner, is attached to the commission.

17. Q. Have you received any letter or written communication from any attorney or representative of the United States, or Edgar G. Wandless, counsel and proctor for respondent, or representative of his or other person, respecting your testimony herein, or any answer which you might give to any question herein propounded to you?

A. No. I have, however, seen the letter, dated Sep-
[fol. 129] tember 27, 1928, addressed to the Consul General, signed "Edgar G. Wandless."

18. Q. Have you received any oral communication from anyone respecting your testimony herein, or your answers to any question which might be propounded to you herein?

A. No.

19. Q. If you have answered the 17th Cross Interrogatory in the affirmative, then attach to your deposition herein such writing, or a true copy thereof, and mark the same "Libellant's Exhibit VI."

A. No answer.

20. Q. If you have answered the 18th Cross Interrogatory in the affirmative then state the names of any and all persons from whom such oral communication or communications have been received by you, and the substance thereof.

A. No answer.

LIBELLANT'S EXHIBIT I

The following men in the Engine Department of the s.s. "American Shipper" were assigned to day work when the vessel departed from New York, at 4 P. M. February 16th:

Oilers:

Carl Koski and one other man (name not known).

On deck the following sailors were assigned to day work:

A.B.'s:

Churchill, Wilmer, Conlon, Avery, Shaffer and Leslie.

[fol. 130] I claim these men were assigned to duty in violation of Section 2 of the Seamen's Act of March 4, 1915, and therefore I am entitled to my wages in full. I am also claiming in accordance with Section 4583 of the United States Revised Statutes one month's extra wages and transportation back to the States.

(Signed) Livingston H. McCrea, U. S. Dist. Court, S. D. of N. Y.

London, Feb. 27, 1928.

Witness: H. Garnhan.
Witness: L. M. Hames.

Lib. Ex. I.
May 6, 1932.
A 99-118.

RESPONDENT'S EXHIBIT A

McCrea, Livingston H., Fireman #44. For being absent from ship and duty without proper permission on Feb. 28th, and tho aboard ship from 3:20 PM Feb. 29th to 9:00 AM. March 1st, 1928 he failed to turn to on those day-. Failed to join ship at time of sailing from London and therefore declared a Deserter March 1st having last been seen aboard ship at 9:00 AM March 1st, 1928. Total lost time three (3) days. Logged and fined (six) days pay. $13.00.

(Signed) Schuyler F. Cummings, Master. (Signed) W. Swartridge, Ch. Engineer.

RESPONDENT'S EXHIBIT B
Certificate of Inspection

Form 841

FILE No. V 37399

[Rev 24.]

THIS CERTIFICATE EXPIRES February 26th , 1928.

Secretary's permit to use petroleum as fuel on file in the office of Local Inspectors at Philadelphia, Pa, dated Sep. 20, 1920.

UNITED STATES OF AMERICA
DEPARTMENT OF COMMERCE
STEAMBOAT INSPECTION SERVICE

CERTIFICATE OF INSPECTION
FOR STEAM OR MOTOR VESSEL

State of New York
District of New York

Ocean Passenger *Vessel* AMERICAN SHIPPER

APPLICATION in writing having been made to the undersigned, *Inspectors for this District*, to inspect the above-named vessel propelled by steam, of New York, in the State of New York whereof U.S.Shipping Board owner, and Schuyler F.Cummings is Master, said inspectors, having completed the inspection of the vessel on the 26th day of February, 192 7, DO CERTIFY that the said vessel was built at Hog Island in the State of Pennsylvania, in the year 1 921; rebuilt in the year 1 -; that the Hull is constructed of steel; and, as shown by official records, is of 7430 gross tons; that the said vessel has 26- Staterooms and 74 - Berths, and is allowed to carry 74 passengers, viz: 74 First cabin, - Second cabin, and - Deck or Steerage Passengers.

Included in the entire crew hereinafter specified and designated there must be 8 certificated lifeboat men.

When engaged in a run of less than 400 miles from the Port of departure to the Port of final destination, 2 Mates are required.

Conditions to be observed in connection with the stability test of this vessel are of record in the office of Local Inspectors at New York.

also is required to carry a full complement of licensed officers and crew, consisting of 1 Master, - Master and Pilot, - Pilot 1 Chief Mate, 1 Second Mate, 1 Third Mate, - Inland Mate, - Chief Mate and Pilot - Second Mate and Pilot, - Third Mate and Pilot, - Inland Mate and Pilot, - 3 Quartermasters, 6 Able Seamen, 2 Seamen, - Apprentices, - Deck Hand, 1 Chief Engineer, 1 First Assistant Engineer 1 Second Assistant Engineer, 1 Third Assistant Engineer, - Junior Engineer, 3 Water Tenders, 3 Oilers, 6 Firemen, - Coal Passer, - Wiper, 2 Watchmen, and also 34 persons when needed in Steward's and other departments not connected with the navigation of the vessel; that the said vessel is provided with 1 turbine Condensing Engine of - - inches diameter of cylinder and --- feet stroke of piston, and 6 Boilers, 14'7-3/8" in length and drum 42 inches in diameter, made of lawful steel, in the year 1 920, rebuilt in the year 1 - The said vessel is permitted to navigate, for one year, the waters of the

-----O C E A N S-----

between , and touching at intermediate ports, a distance of about miles and return.

WE FURTHER CERTIFY that the said vessel at the date hereof is, in all things, in conformity with the laws governing the Steamboat Inspection Service and the Rules and Regulations of the Board of Supervising Inspectors.

THE FOLLOWING PARTICULARS OF INSPECTION ARE ENUMERATED, NAMELY:

Anchors, No. 5 Cables, No. 2	Life buoys 8 Life luminous	MAIN BOILERS.	DONKEY BOILERS.
Has signal lights yes	Has line-carrying projectile, and means of propelling them Lyle Guns	Boiler plate: Thickness of .6"	No.
Metal lifeboats ..... No. 3	Fire extinguishers ..... No. 22	Tensile strength of 55000 lbs	Diameter of
Motor lifeboats ..... No. 1	Portable hand fire pumps ..... No. -	Record in local inspectors' office at Philadelphia, Pa	Thickness of plate
Working boat ..... No. -	Double-acting hand fire pumps ..... No. 2	Boiler shell drilled -- Thickness of plate [illegible] inch.	Tensile strength of plate
[illegible] ..... No. -		Longitudinal seams Double [illegible]	Record in local inspectors' office at

owner , and Pennsylvania R.R.Cummings is Master, said inspectors, having completed the inspection of the vessel on the 26th day of February , 192 7, DO CERTIFY that the said vessel was built at Reg Island in the State of Pennsylvania , in the year 1 921 ; rebuilt in the year 1 - ; that the Hull is constructed of steel ; and, as shown by official records, is of 7430 gross tons; that the said vessel has 26- Staterooms and 74 - Berths, and is allowed to carry 74 passengers, viz: 74 First cabin, - Second cabin, and - Deck or Steerage Passengers.

Included in the entire crew hereinafter specified and designated there must be 8 certificated lifeboat men.

When engaged in a run of less than 400 miles from the Port of departure to the Port of final destination, 2 Mates are required.

Conditions to be observed in connection with the stability test of this vessel are of record in the office of Local Inspectors at New York.

also is required to carry a full complement of licensed officers and crew, consisting of 1 Master, - Master and Pilot, - Pilot 1 Chief Mate , 1 Second Mate , 1 Third Mate , - Inland Mate , - Chief Mate and Pilot - Second Mate and Pilot , - Third Mate and Pilot , - Inland Mate and Pilot , - 3 Quartermasters , 6 Able Seamen, 2 Seamen, - Apprentices, - Deck Hand , 1 Chief Engineer, 1 First Assistant Engineer 1 Second Assistant Engineer , 1 Third Assistant Engineer , - Junior Engineer , 3 Water Tenders 3 Oilers , 6 Firemen, - Coal Passer , - Wiper , 2 Watchmen, and also 34 persons when needed in Steward's and other departments not connected with the navigation of the vessel; that the said vessel is provided with 1 turbine Condensing Engine of - - inches diameter of cylinder and --- feet stroke of piston, and 6 Boilers, 14'7-3/8" in length and drum 42 inches in diameter, made of lawful steel , in the year 1 920 , rebuilt in the year 1 - The said vessel is permitted to navigate, for one year, the waters of the

-----O C E A N S-----

between , and touching at intermediate ports, a distance of about miles and return.

We further certify that the said vessel at the date hereof is, in all things, in conformity with the laws governing the Steamboat Inspection Service and the Rules and Regulations of the Board of Supervising Inspectors.

THE FOLLOWING PARTICULARS OF INSPECTION ARE ENUMERATED, NAMELY:

Anchors, No. 5 Cables, No. 2 Has signal lights yes Metal lifeboats ..... No. 3 Motor lifeboats ..... No. 1 Working boat ..... No. - Collapsible lifeboats ..... No. - Every lifeboat has equipment in accordance with the rules yes Life rafts ..... No. - Life preservers for adults ..... No. 141 Life preservers for children ..... No. 15	Ancillary lifesaving appliances, No. and kind 19 Fire buoys 5 life luminous Has line-carrying projectile, and means of propelling same Lyle Guns Fire extinguishers ..... No. 22 Portable hand fire pumps ..... No. - Double-acting hand fire pumps ..... No. 2 Fire hose, total length of 900 feet. Fire buckets ..... No. 25 Water barrels ..... No. - Water tanks, No. - Aggr. No. 8 Date when shell was last drawn Sept.1926	MAIN BOILERS. Boiler plate: Thickness of .5" Tensile strength of 55000 lbs Record in local inspectors' office at Philadelphia, Pa Boiler shell drilled -- .1 Thickness of plate, lowest --- inch. Longitudinal seams DBSdouble riveted. Holes drilled Maximum steam pressure allowed 200 lbs. Hydrostatic pressure applied 300 lbs. Main steam pipe, thickness of .505 inch. Feed pumps for boilers ..... No. 4 Steam fire pumps, double-acting, No. 2	DONKEY BOILERS. No. ----- Diameter of Thickness of plate Tensile strength of plate Record in local inspectors' office at Maximum steam pressure allowed to donkey boiler, pounds. Hydrostatic pressure applied to donkey boiler, pounds.

State of New York
City & County of New York } ss:

G.T.Charlton, Inspector of Hulls.
J.T.Crone, Inspector of Boilers.

Subscribed and Sworn (Sworn or affirmed) to before me this 28th day of February, 192 7, by G.T.Charlton Inspector of Hulls, and by J.T.Crone, Inspector of Boilers.

E.H.Avery
Notary Public N.Y.Co

Office of U. S. Local Inspectors,
District of (Port) New York,N.Y., February 28, 1927.

We hereby certify that the above certificate is a true copy of the original issued by this office to the vessel named herein.

G.T.Charlton, Inspector of Hulls. J.T.Crone, Inspector of Boilers.

On vessels of over 25 gross tons, the original certificate must be framed under glass and posted in a conspicuous place in the vessel where it will be most likely to be observed by passengers and others. On vessels of not over 25 gross tons, the original certificate must be kept on board to be shown on demand. (*Section 4423, Revised Statutes.*)

Steam pleasure yachts are forbidden to carry merchandise or passengers for pay, unless upon change of character by the Inspectors of the Steamboat Inspection Service.

11—4186

[fol. 132] RESPONDENT'S EXHIBIT "A"—ATTACHED TO DEPOSITION OF DANIEL MILLER

Libellant's Exhibit "II"—Attached to Deposition of Daniel Miller

The following men in the Engine Department of the s.s. "American Shipper" were assigned to day work when the vessel departed from New York, at 4 P. M. February 16th:

Oilers:

Carl Koski and one other man (name not known).

On deck the following sailors were assigned to day work:

A. B.'s:

Churchill, Willmer, Conlon, Avery, Shaffer and Leslie.

I claim these men were assigned to duty in violation of Section 2 of the Seamen's Act of March 4, 1915, and therefore I am entitled to my wages in full. I am also claiming in accordance with Section 4583 of the United States Revised Statutes one month's extra wages and transportation back to the States.

(Signed) Livingston H. McCrea.

London, February 27, 1928.
D. M.

Witness: (Signed) H. Garnham.
Witness: (Signed) L. M. Hames.

(Documentary Stamp.)

[fol. 133] RESPONDENT'S EXHIBIT "B"—ATTACHED TO DEPOSITION OF LOWELL C. PINKERTON

Respondent's Exhibit "B"—Attached to Deposition of Daniel Miller

Libellant's Exhibit "II"—Attached to Deposition of Daniel Miller

(Copy)

Feb. 29th, 1928,
London, England.

Mr. Pinkerton Am. Vice Councillor, Cavendish Sq., London, England.

DEAR SIR: As per your request of Monday, Feb. 27th, 1928, I am hereby submitting in writing a statement in regards violation of Sec. 2 of the Seamen's act as violated aboard "S. S. Am. Shipper" in Command of Capt. Cummings.

I requested my wages in full on the above date stating verbally & in writing the names of seamen who violated the law also time and place.

I also requested a month's extra wages & transportation back to the states as provided for under the United States revised statu-es #4583.

All of which was refused me by you.

I beg to remain yours resp.

(Signed) L. H. McCrea Fireman "S.S. Am. Shipper," Surrey Docks, London, England.

(Documentary Stamp.)

[fol. 134] RESPONDENT'S EXHIBIT C—ATTACHED TO DEPOSITION OF DANIEL MILLER

Libellant's Exhibit "I"—Attached to Deposition of Danial Miller

Libellant's Exhibit "I"—Attached to Deposition of Lowell C. Pinkerton

London, England,
March 1, 1928.

886 DM:FR.

Mr. L. H. McCrea, Fireman, "s. s. American Shipper," Surrey Docks, London.

SIR: I am directed by the Consul-General to reply to your letter of February 29, 1928, in which you say you are submitting in writing a statement in regard to an alleged violation of Section 2 of the Seamen's Act on board the "s. s. American Shipper," which arrived here February 26, 1928, from New York, and in which you claim a month's extra pay and transportation back to the United States on account of the alleged violation.

As your letter gives no details in regard to the alleged violation, and is not accompanied by any statement in writing, it is presumed you also refer to the signed statement executed by you in this Consulate-General on February 27, 1928, to the effect that various oilers and able seamen were assigned to day work during the voyage just completed by the "American Shipper" from New York to London; that such assignment was in violation of Section 2 of the Seamen's Act of March 4, 1915; and that you are therefore [fol. 135] entitled to your wages in full, and also claim one month's extra wages and transportation back to the United States (under Revised Statutes' 4583, December 21, 1898, section 18).

From your letter and your signed statement, it would appear that the specific violation which you have in mind consists in the fact that, according to the statement, two oilers and six able seamen were assigned to day work, whereas section 2 of the Act of March 4, 1915, provides

that "the sailors shall, while at sea, be divided into at least two, and the firemen, oilers and water tenders into at least three, watches, which shall be kept on duty successively for the performance of ordinary work incident to the sailing and the management of the vessel."

As you were advised when you called personally at the Consulate-General, it is the opinion of this office that you are not entitled to discharge for the reason which you present and I have therefore declined to require the master of the "American Shipper" to pay you the arrears of wages, extra wages and transportation to the United States as claimed.

Very respectfully yours, Daniel Miller, American Vice-Consul.

(A true copy of the signed original—F. R.)

(Documentary Stamp.)

[fol. 136] Libellant's Exhibit "IV"—Attached to Deposition of Daniel Miller

(Copy)

Consular Regulations, Article XIII, Discharge of Seamen, Paragraph 205, which reads as follows:

Penalty for failure to return seamen.—The master of every vessel bound on a foreign voyage or engaged in the whale fishery is required by law to exhibit a certified copy of the crew list to the first boarding officer at the first port in the United States at which he shall arrive on his return and also to produce the persons named in the crew list. For each failure to produce any person on the certified copy of the crew list the master and the owner of the vessel are severally liable to a penalty of $400. But the penalty is not incurred for failure to produce any person named in the crew list who has been discharged in a foreign country with the consent of a consular officer, certified in writing under his hand and official seal to be produced to the collector with the other persons composing the crew list; nor on account of any such persons dying or absconding or being forcibly impressed into other service of which satisfactory proof shall then also be exhibited to the collector. A

master can not lawfully discharge a seaman in a foreign port without the intervention of the consular officer; and it is not material in such case that the discharge is made with the seaman's consent, or that he has misconducted himself, or is not a citizen of the United States.—R. S. 4576; Op. Att. Gen., 349; I Low, 107; Tawney's Dec., 24; 29 Stat. L., 688; E. O. Oct. 21, 1915; E. O. Sept. 5, 1922.

(Documentary Stamp.)

[fol. 137] LIBELLANT'S EXHIBIT "V"—ATTACHED TO DEPOSITION OF DANIEL MILLER

Home Office, 26 Sep., 1921.

DEAR SIR: I beg to enclose for your information a copy of the "Notice to Masters" which will be served on the Masters of all ships arriving at the principal British Ports from Foreign, or coastwise from foreign, on and after 1st October, 1921.

I also enclose copy of a letter addressed by the Immigration Officers at the principal ports to the foreign Consuls and Mercantile Marine Representatives in their district.

I beg to say that on and after that date all alien seamen (except any upon whom a notice of refusal of leave to land is served) will have permission to land temporarily during the stay of the ship in port, but this permission will not as heretofore be given in writing.

Permission to land for discharge will be given to an alien seaman by the stamp of the Immigration Officer on the passport or consular certificate with the words "for discharge" written inside or close against the stamp. An alien seaman who is found ashore after his ship has sailed will be liable to prosecution under the Aliens Order 1920 unless he has this stamp on his passport or consular certificate showing that he has had permission to land for discharge and leave the ship.

[fol. 138] In order to ensure the smooth working of the regulations, and to avoid contraventions of the Aliens Order, I trust that you will be good enough to cooperate with the Immigration Staff by refusing to sign off an alien whose papers do not bear the Immigration Officer's stamp

and the words "for discharge", and that you will request your consuls at other ports to follow the same course. Any alien seaman who presents himself for discharge without the Immigration Officer's stamp on his papers should be referred to the Immigration Officer in the port in order to obtain it.

W. Haldane Porter, H. M. Chief Inspector, Aliens Branch.

(Documentary Stamp.)

The Consul General for the United States of America. 8L.169.

Part of Aliens Order, 1920

Notice to Masters of All Vessels from Foreign Including Vessels Arriving Coastwise from Foreign

Passengers. The Master must report to the Immigration Officer (by telephone or otherwise) as soon as the ship ar- [fol. 139] rives, if he has any passengers on board—including British subjects, distressed British seamen, passage workers, and stowaways. The Immigration Officer will then visit the ship. Every passenger must produce his passport or other papers to the Immigration Officer before leaving the ship.

Crew Lists. The attached crew list must be filled in by the Master and be delivered to the nearest Immigration office as soon as possible after the arrival of the ship. The crew list should include all coloured seamen who do not hold either a British passport or an emergency certificate of British nationality or a Board of Trade R. S. 2 certificate describing him as a British subject.

Crews. Under the Aliens Order no alien member of a crew (including a passage worker) may land for discharge, or if discharged on board ship may land, without the permission of an Immigration Officer. To obtain this permission the Master must send the aliens who wish to be discharged, with a ship's officer, to the Immigration Office. Each alien must bring his passport and other papers with him. The Board of Trade and foreign Consuls will not pay off an alien until his passport has been endorsed by the Immigration Officer "for discharge".

Alien members of the crew who are not to be discharged at this port are hereby granted temporary shore leave dur-
[fol. 140] ing the ship's stay in port, but this permission shall not apply to any alien upon whom a refusal notice is served by the Immigration Officer. The Master must report immediately to the Immigration Officer the desertion of any alien member of his crew.

By Order of the Secretary of State for the Home Department. P. T. O.

DEAR SIR: I am directed to forward for your information a copy of the "Notice to Masters" which will be served on the Masters of all ships arriving from foreign, or coastwise from foreign, at this port on and after ——.

By H. M. Customs,
Boarding Officer.

I am to point out that on and after that date all alien seamen (except any upon whom a notice of refusal of leave to land is served) shall have permission to land temporarily during the stay of the ship in port, but this permission will not as heretofore be given in writing.

Permission to land for discharge will be given to an alien seaman by the stamp of the Immigration Officer on the passport or consul certificate with the words "for discharge" written inside or close against the stamp. An alien seaman who is found ashore after his ship has sailed will be liable to prosecution under the Aliens Order 1920 unless he has
[fol. 141] this stamp on his passport or consular certificate, showing that he has had permission to land for discharge and leave the ship.

In order to ensure the smooth working of this regulations and to avoid contraventions of the Aliens Order, I am directed to ask for your full cooperation with regard to the discharge of alien seamen at this port, and to express the hope that any alien seaman who comes before you for discharge without the Immigration Officer's stamp on his papers may be referred to this Office to obtain it.

Yours faithfully, —— ——.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

A 99-118

LIVINGSTON H. MCCREA, Libellant,

vs.

UNITED STATES OF AMERICA, as Owner of the Steamship "American Shipper," Her Engines, Tackle, Appar-tus, etc., Respondent

John M. Scoble, Esq., attorney for Libellant.

Honorable George Z. Medalie, United States Attorney, for Respondent, (Frederick H. Cunningham, Esq., of counsel).

OPINION

[fol. 142] July, 1932.

KNOX, D. J.:

This action is brought by a seaman to recover wages claimed to be due him upon his arrival in London, England, on February 26, 1928. Furthermore, he asks for one month's additional wages, together with the amount of expenses allegedly incurred by him in securing transportation back to the United States, and also two days pay for each day since the above mentioned date.

Libellant was duly hired on or about February 15, 1928, to serve as a fireman on the vessel "American Shipper" on a voyage from New York to London and return, at wages of sixty-five dollars per month. Upon the arrival of the ship in London, libellant demanded of the master his discharge from the vessel, the payment of the balance of wages standing to his credit, one month's additional pay, and that he be provided with adequate employment on board some other vessel back to New York, quoting the titles of Section 2 of the Seamen's Act, and Revised Statutes, 4583. Seamen's Act, Section 2, (38 Stat. 1164, 46 U. S. C. A., Section 673) provides in part:

"In all merchant vessels of the United States of more than one hundred tons gross, excepting those navigating rivers, harbors, bays or sounds exclusively, the sailors shall,

while at sea, be divided into at least two, and the firemen, oilers, and water tenders into at least three watches, which [fol. 143] shall be kept on duty successively for the performance of ordinary work incident to the sailing and management of the vessel."

In the case of O'Hara vs. Luckenbach Steamship Company, 269 U. S. 364, the Supreme Court of the United States held that under this section all the sailors of a vessel coming within the terms of the statute, must be divided into watches as nearly equal to each other numerically as the whole number of sailors will permit, pointing out that the purpose of the enactment was to promote safety at sea rather than to regulate the working conditions of the men.

In the case at bar there was clearly a violation of the exact requirements of the statutes, as authoritatively interpreted by the Supreme Court. According to the testimony of the respondent's own witness, Captain Cumings, the thirteen seamen on the vessel were not as equally divided into watches as that number permitted. Instead, three seamen were placed on each of the three watches, and four men were used for day duty and were not on any watch. It further appears that three oilers were not placed on any watch, but were assigned to day duty. The firemen and water tenders, however, appear to have been equally divided into three watches.

Upon this state of facts, there is no doubt that libellant was

"entitled to discharge from such vessel and to receive the wages earned."

[fol. 144] O'Hara vs. Luckenbach Steamship Company, supra. The fact that the vessel carried more seamen than was required by its certificate of inspection did not relieve the ship from compliance with the requirements of the statute. The additional men should also have been divided into watches. Southern Steamship Company v. Hair, 24 Fed. (2d) 94.

The acts of respondent in violating Section 2 of the Seamen's Act gave libellant the right to demand his discharge and to receive the wages he had earned. O'Hara v. Luckenbach Steamship Company, supra; Southern Steamship Company v. Hair, supra.

It does not seem to me, however, that libellant is entitled to an extra month's wages, and the cost of his passage home by reason of the provisions of R. S. 4583, (46 U. S. C. A. 685). That section of the shipping law is as follows:

"Whenever on the discharge of a seaman in a foreign country by a consular officer on his complaint that the voyage is continued contrary to agreement, or that the vessel is badly provisioned or unseaworthy, or against the officers for cruel treatment, it shall be the duty of the consul or consular agent to institute a proper inquiry into the matter, and, upon his being satisfied of the truth and justice of such complaint, he shall require the master to pay to such seaman one month's wages over and above the wages due [fol. 145] at the time of discharge, and to provide him with adequate employment on board some other vessel, or provide him with a passage on board some other vessel bound to the port from which he was originally shipped, or to the most convenient port of entry in the United States, or to a port agreed to by the seaman."

The applicability of the terms of the statute just quoted to Section 673, out of which libellant's cause of complaint arises, was a subject of consideration by the Acting Attorney General of the United States upon August 9, 1927. That official then advised the Secretary of Labor that the provisions of Section 685, (being Section 4583 of the Revised Statutes, as amended) relating to the payment of an extra month's wages to seamen discharged in a foreign country because "the voyage is continued contrary to agreement" are not to be applied to consuls in cases of complaint by seamen for violation of Section 2 of the Seamen's Act of March 4, 1915. 35 Opinions of Attorney General, 292. General Farnum, who thus ruled, said, inter alia:

"Finally, in drafting section 2 of the Seamen's Act of March 4, 1915, Congress specifically dealt with the consequences of the violation of the prohibited acts and provided that 'whenever the master of any vessel shall fail to comply with this section,' then, in that event, 'the seaman shall be entitled to discharge from such vessel *and to receive the* [fol. 146] *wages earned.*' If Congress had intended this to be only a measure of partial relief in case of such violation, and had contemplated that a seaman would be granted the additional relief provided in section 4583 of the Revised

Statutes as amended, it is difficult to understand why it was not so specifically provided. The fact that Congress omitted such a reference, and did clearly and expressly deal with the measure of relief to be accorded, clearly indicates that such relief was to be exclusive. • • •"

This view of the law is not binding on this Court but I conceive it to be correct, and shall adopt it as my own.

Finally, a determination must be made as to whether libellant, by virtue of Section 3 of the Seamen's Act, (46 U. S. C. A., section 596), is entitled to two days' pay for each and every day during which payment of his wages has been delayed. The requirement of the law is that wages to which a seaman on a vessel making foreign voyages is entitled, shall be paid

—"within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens."

If, in the absence of sufficient cause, such payment be not made, the master or owner of the vessel shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods allowed by the statute.

[fol. 147] In O'Hara v. Luckenbach Steamship Company, 16 Fed. (2d) 681, after stating that

"the phrase 'without sufficient cause' "

should be construed as equivalent to

"without reasonable cause"

the court held

"that the refusal to make payment (in the case before it) was based upon reasonable cause, and that it would be unjust to penalize the steamship company because it litigated the question."

It should be noted that the interpretation of Section 2 of the Seamen's Act was in doubt when the Luckenbach suit was brought. In Southern Pacific Company v. Hair, supra, however, libellant was allowed to recover double pay, because the section had then received a final interpretation. Judge Walker stated:

"In view of the decision in the case of O'Hara v. Luckenbach S. S. Co., supra, we do not think that the fact that appellant in good faith desired to get its above considered contention judicially passed on constituted sufficient cause for the failure to pay appellees their earned wages."

For the same reason, respondent here can not claim that the master's doubt as to the meaning of the statute constituted "sufficient cause" for his failure to pay libellant.

For other reasons, nevertheless, I believe libellant should not recover double pay for the entire period over which [fol. 148] he claims he is entitled to receive the same. As appears from the proof, McCrea made his demand while the master was advancing money to members of the crew who were about to take shore leave. At that time the master declined to comply with the requests and demands of McCrea, but he asked the libellant to meet him the next afternoon at the American Consulate.

No claim is made of any ill treatment either in respect of this request or upon account of events transpiring during the voyage over. On the morning following the request made of Captain Cumings, McCrea orally presented his demand at the American Consulate, but left the office without awaiting the captain's arrival. The next day he departed the ship without seeing the captain, although that officer testified to his presence on board each and every day the ship was in port. On the day succeeding libellant's abandonment of the vessel, his written complaint was received at the Consulate, as had been requested. A Vice-Consul thereupon wrote McCrea that he was not entitled to his discharge, addressing the letter to the ship—the only address of libellant of which the Vice-Consul had knowledge. Since McCrea had already left the vessel, he never received the letter.

These facts make is apparent that McCrea did not give the captain a reasonable time within which to consider his demand. The proof is productive of a strong inference [fol. 149] that McCrea was not really desirous of favorable action upon his request for a discharge, and the payment of his wages. He wished, on the other hand, to make out a case against the vessel and her owner. In this connection, observation may be made that, having regard for the responsibilities of a master as imposed by Section 4576 of the Revised Statutes, as well as by other provisions of

law, it would be harsh and unreasonable to require him to make instantaneous decision upon questions of law raised by a seaman under pain of subjecting his owner to onerous burdens, should it subsequently appear, as it does, that McCrea's demand for discharge should have been granted. No such requirement is imposed by the statute. As previously stated, Section 3 of the Shipping Act requires a master to pay every seaman his wages,

"within twenty-four hours after the cargo has been discharged, or *within four days* after the seaman has been discharged, whichever first happens."

In the case at bar, libellant has not shown when the cargo was discharged. Consequently, assuming that within the statute libellant may be deemed to have received his discharge on the day upon which he demanded it, the captain still had four days within which to make payment.

In the light of the Captain's request that McCrea meet him at the Consulate, and that the latter failed to do so, there, or at any other place, although the master was on board the ship every day the vessel lay at London, it is apparent that the captain was without opportunity to pay [fol. 150] McCrea throughout the period within which he was entitled to reach a final decision. It follows that the master's failure to make payment to libellant was not "without sufficient cause," and, in consequence, libellant is not entitled to recover double pay from February 26, 1928. He should, however, receive double pay for the number of days that have intervened since this suit was begun, and the date of decree to be made herein. The reason which justified the master in withholding libellant's pay in London had ceased when libellant returned to the United States and made formal demand for the money payable to him at the time of his protest to the captain of the vessel. The right of libellant to his pay, under the Luckenbach decision was so obvious that the delay in making payment of this item since the libel was filed, cannot be said to have come about from a "sufficient cause."

July 26th, 1932.

—— ——, U. S. D. J.

[fol. 151] IN UNITED STATES DISTRICT COURT

APPLICATION ON BEHALF OF RESPONDENT FOR REHEARING

WEC:MG.
#35544.

August 13, 1932.

Docket No. A 99-118

LIVINGSTON MCCREA

v.

UNITED STATES—S. S. "American Shipper"

Hon. John C. Knox, United States District Judge, Woolworth Building, New York City.

MY DEAR JUDGE KNOX: Since reading your Honor's opinion in the above entitled case, in which a decree has been presented awarding to the libellant penalties against the United States for withholding wages, under the provisions of 46 U. S. C. A. 696, my attention has been called to the decision of Judge Goddard in Corrigan v. United States, 298 Fed. 610, 613, in which it was squarely held that under the same statute penalties could not be imposed against the United States. The decision cites the Supreme Court case, to the same effect, of Missouri Pacific R. R. Co. and Director General v. Ault, 256 U. S. 554, 563.

I am unable to find any decisions to the contrary.

[fol. 152] It seems to me, therefore, that a motion for rehearing should be granted in this case. Unfortunately I had planned to leave on a vacation on the 17th, and I understand that Mr. Scoble, proctor for the libellant, is now away, and would suggest, if agreeable to your Honor, that the signing of any decree be deferred at this time so that a motion for reargument can be made at a later date convenient to the Court and counsel.

I am sending a copy of this letter to Mr. Scoble.

Respectfully, William E. Collins, Special Assistant to the United States Attorney.

CC to John M. Scoble, Esq., 55 Liberty Street, New York City.

WEC:MG.

[fol. 153] IN UNITED STATES DISTRICT COURT

A 99-118

LIVINGSTON H. MCCREA, Libellant,

against

UNITED STATES OF AMERICA, as Owner of the Steamship "American Shipper," Her Engines, Tackle, Apparatus, etc., Respondent

Present: Honorable John C. Knox, District Judge.

DECREE—Aug. 12, 1932

The above entitled cause having come on to be heard upon the pleadings, proceedings and proofs herein filed on behalf of the above parties; and having been argued by their respective advocates; and after due proceedings had; on motion of John M. Scoble, Esq., proctor for the libellant; and due deliberation having been had, it is hereby

Ordered, adjudged and decreed, as follows:

That the libellant, Livingston H. McCrea, recover of and [fol. 154] from the United States of America, respondent herein, the sum of $28.95, constituting the wages due the libellant at the time of the demand therefor, to wit, the 26th day of February, 1928; and that libellant recover in addition, two days pay for one, namely, at the rate of $4.33 per day or $130.00 per month, from the 11th day of July, 1928, the date of the commencement of this suit, to the 12th day of August, 1932, the date of the entry of this decree, to wit, the sum of $6,374.33, together with the sum of $42.50 libellant's costs as taxed, together with the further sum of $40.00 for loss of clothing and effects, amounting in all to the sum of $6,456.83, with interest thereon at 4% per annum until paid.

Jno. C. Knox, C. W., United States District Judge.

Filed August 15, 1932.

[fol. 155] In United States District Court, Southern District of New York

[Title omitted]

Decision Granting Rehearing

Memorandum

In view of the decision in Corrigan vs. United States, 298 Fed. 610, which has now been brought to my attention for the first time, I will grant a rehearing in the above entitled suit. Counsel for the parties may arrange a time for rehearing by communicating with my secretary.

August 30, 1932.

Jno. C. Knox, U. S. D. J.

[fol. 156] In United States District Court, Southern District of New York

A 99-118

Livingston H. McCrea, Libellant,

against

United States of America, as Owner of the Steamship "American Shipper," Respondent

John M. Scoble, Esq., Proctor for Libellant.

Hon. George Z. Medalie, United States Attorney (William E. Collins, Esq., Assistant United States Attorney), of counsel.

February, 1933.

Opinion

Knox, D. J.

Knox, D. J.:

By memorandum opinion, dated August 30, 1932, a reargument of this case was granted. (See also former opinion in this suit dated July 26, 1932.) The question now before the Court, and which was not raised upon the original argument, is whether libellant is entitled to recover double

wages under R. S. Sec. 4529, 46 U. S. C. A., Section 596, in a suit brought against the United States. Respondent objects to the imposition of this liability on the ground that, in the absence of consent which is said not to have been [fol. 157] given, it cannot be subjected to a charge which is, or is in the nature of a penalty.

Libellant contends that the statute does not impose a penalty, but merely provides for increased compensation to seamen in the event of an unjustifiable delay in the payment of their wages. In support of his position, libellant relies principally upon three cases decided by the Circuit Court of Appeals for the Ninth Circuit, viz: Vincent v. United States, 272 Fed. 889; Gerber v. Spencer, 278 Fed. 886 and Buckley v. Oceanic S. S. Co., 5 F. (2d) 545, and upon the case of Cox v. Lykes Brothers, 237 N. Y. 376, 1924 A. M. C. 656.

The decision in Vincent v. United States undoubtedly required the United States to pay double wages under R. S. Section 4529. However, the point here raised seems not to have been litigated. If it was, the opinion of the Court is silent upon the question. In fact, it is arguable that had the matter come up for discussion, the ruling might have gone against libellants. I say this for the reason that the Court regarded the obligation to pay double wages as the imposition of a penalty upon the respondent.

In Gerber v. Spencer, it was held that seamen's claims for double pay under R. S. 4529 were protected by a lien similar to that which will attach for ordinary wages. At page 889, the Court said,—

"The purpose of the statute—is to secure to the seaman [fol. 158] an amount as extra pay by way of compensation for delay. The extra pay is an incident to the claim of wages proper."

In Buckley v. Oceanic S. S. Co., it was held that a seaman's suit for double pay was a suit for wages, and not for a penalty. Therefore, it was governed by the two year statute of limitations under Section 339 of the California Code of Civil Procedure, rather than by United States Revised Statutes, Section 1047, which permits suits to recover a penalty, accruing under the laws of the United States, to be commenced within five years after such accrual.

In Cox v. Lykes, the New York Court of Appeals, per Cardozo, J., held that a State Court had jurisdiction to give judgment for double wages, because under R. S. 4529 they constituted wages and were not a penalty within the meaning of Section 256 of the Judicial Code (28 U. S. C. A., Sec. 371), which confers upon the Federal Courts exclusive jurisdiction

"Of all suits for penalties and forfeitures incurred under the laws of the United States."

As opposed to these cases, respondent places chief reliance upon the decision of the Supreme Court in the case of Missouri Pacific R. R. Co. v. Ault, 256 U. S. 554. It was there held that the United States, which had taken possession and control of the railroad, was not liable for the payment of a penalty for non-payment of wages to rail- [fol. 159] road employees, imposed by a statute of the State of Arkansas. In that case, Section 10 of the Federal Control Act declared that the carriers

"shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law";

and Section 15 stated that the

"lawful police regulations of the several states"

should continue unimpaired. The Arkansas statute provided that if a railroad failed to pay an employee his full wages within seven days after his discharge

"then as a penalty for such non-payment the wages of such servant or employee shall continue from the date of the discharge or refusal to further employ, at the same rate until paid."

With reference to the nature of this statute, the Supreme Court of Arkansas held that, technically, it was not a penalty, and had said in Leep v. Railway Company, 58 Ark. 407, 440, 441:

"It is allowed for a double purpose, as a compensation for the delay, and as a punishment for the failure to pay. It is composed of all the elements and serves all the purposes of exemplary damages."

Despite this construction of the provisions of the statute, the Supreme Court held that, in fact, it imposed a penalty to which the government had not consented to submit. At page 564, Mr. Justice Brandeis said:

[fol. 160] "The purpose for which the Government permitted itself to be sued was compensation, not punishment * * * Wherever the law permitted compensatory damages they may be collected against the carrier while under federal control. * * * *But double damages, penalties, and forfeitures, which do not merely compensate but punish,* are not within the purview of the statute * * * the amount recovered in the present case over and above the wages due and unpaid with interest *is in the nature of punishment* * * * Whatever name be applied, the element of punishment clearly predominates and Congress has not given its consent that suits of this character be brought against the United States." (Italics mine.)

This decision, true enough, dealt with a State statute, while the cases which are cited by libellant had to do with the identical statute involved in the present suit. Nevertheless, I am inclined to believe that the decision in the Ault case is controlling here. As pointed out by Cardozo, J., in Cox v. Lykes Brothers, supra.

"the same provision may be penal as to the offender and remedial as to the sufferer * * * *The nature of the problem will determine* whether we are to take one viewpoint or the other." (Italics mine.)

In that case, "the problem" was whether the State Court has jurisdiction to give a judgment for double damages [fol. 161] against a private corporation. Since Congress had enacted that such damages

"shall be recoverable as wages"

the Court of Appeals of New York said that

"in determining the bounds of jurisdiction, it is not to be classified as a penalty."

Similarly, in Buckley v. Oceanic S. S. Co., supra, the question was with regard to which statute of limitations should apply. In Gerber v. Spencer, the problem was whether a

seaman's claim for double pay was protected by a lien. In each suit the focus of attention was upon the jurisdiction and procedure incident to the assertion of claims by seamen, as to whom the provisions of R. S. 4529 are, to some extent, undoubtedly compensatory. Where, however, the focus of attention has been upon the respondent rather than upon the person seeking recovering, the Supreme Court has indicated, that differing considerations may lend to a different result.

In Collie v. Ferguson, 281 U. S. 52, the Supreme Court held the double pay provision of R. S. Section 4529 to be inapplicable in a case where the delay in payment of wages was due to the insolvency of the owner of the vessel on which the seaman was employed. In referring to the language of the statute, the court said, at pages 55, 56:

"We think the use of this language indicates a purpose to protect seamen from delayed payments of wages by the imposition of a liability which is not *exclusively compensatory,* but designed to prevent by its *coercive effect,* arbi- [fol. 162] trary refusals to pay wages, and to induce prompt payment when payment is possible." (Italics mine.)

Earlier in the opinion, after citing with approval many of the cases upon which the present libellant relies, the court stated that

"the increased payment for waiting time is not denominated wages by the statute, and the direction that it shall be recovered as wages does not purport to affect the condition prerequisite to its accrual * * *"

Although, in that case, the point chiefly litigated was not the same as that now before this court, the opinion is important in that it recognizes the fact that double wages are treated "as wages" for some purposes does not mean that they shall always be so recognized.

In the present suit "the nature of the problem" is different from that before the court in the cases which libellant cites. Although for purposes of jurisdiction and procedure, a suit for double pay may be classified as one based upon a claim for compensation, it does not necessarily follow that the imposition of liability for double pay upon the Government is not truly to be regarded as being in

the nature of a penalty, or punishment. Cf. Collie v. Ferguson, supra.

In the Ault case, which was treated as a suit against the United States, the Supreme Court established a test for [fol. 163] determining whether a statute is penal as to the United States. Under that criterion, the provisions of R. S. Sec. 4529 with respect to double pay clearly appear to be penal. In the Ault case, the Arkansas statute provided for the continued payment of wages at the same rate from the time of discharge until the date when the wages were paid. In the suit at bar, the burden imposed is twice as heavy: the offending party must pay

"a sum equal to *two days' pay for each and every day* during which payment is delayed."

From the decision and reasoning of the Ault case, it would seem that this liability cannot be imposed upon the Government. See Corrigan v. United States, 298 F. 610.

The decision previously rendered is modified so as to eliminate libellant's recovery of two days' pay for each day since the date upon which he was entitled to his discharge.

February 10, 1933.

Jno. C. Knox, U. S. D. J.

[fol. 164] In United States District Court

A 99-118

Livingston H. McCrea, Libellant,

against

United States of America, as Owner of the Steamship "American Shipper," Her Engines, Tackle, Apparatus, etc., Respondent

Present: Honorable John C. Knox, District Judge.

Final Decree—March 8, 1933

The above entitled cause having come on to be heard upon the pleadings, proceedings and proofs herein filed on behalf of the above parties; and having been argued by their respective advocates; and after due proceedings had;

on motion of John M. Scoble, Esq., proctor for the libellant; and due deliberation having been had, it is hereby

Ordered, adjudged and decreed, as follows:

That the libellant, Livingston H. McCrea, recover of and from the United States of America, respondent herein, the [fol. 165] sum of $28.95, constituting the wages due the libellant at the time of the demand therefore, to-wit, the 26th day of February, 1928; and that libellant recover in addition the further sum of $40.00 for loss of clothing and effects, making the total sum of $68.95, with interest thereon from the 26th day of February, 1928, to the date hereof, amounting to $21.37 together with libellant's costs as taxed, in the amount of $42.50, amounting in all to the sum of $132.82, with interest thereon at 4% per annum until paid.

Filed Mar. 9, 1933.

John C. Knox, U. S. D. J.

In United States District Court, Southern District of New York

[Title omitted]

Notice of Appeal

Please take notice that Livingston H. McCrea, libellant in the above entitled action, hereby appeals to the United [fol. 166] States Circuit Court of Appeals, for the Second Circuit, from each and every part of the final decree herein, dated the 8th day of March, 1933, and entered on the 8th day of March, 1933, in the office of the Clerk of the United States District Court, Southern District of New York, except that part of said decree which awards to the libellant the sum of $28.95, constituting the wages due the libellant at the time of the demand therefor, and the sum of $40.00 for loss of clothing and effects.

Dated New York, March 15th, 1933.

Yours, etc., John M. Scoble, Esq., Proctor for Libellant, Office & Post Office Address: 55 Liberty Street, Borough of Manhattan, City of New York.

To George Z. Medalie, Esq., United States Attorney, Proctor for Respondent, 45 Broadway, New York City.

[fol. 167] In United States District Cou , Southern District of New York

[Title omitted]

Petition for Appeal

To the Honorable John C. Knox:

The above named libellant, Livingston H. McCrea, feeling aggrieved by the decree rendered and entered in the above entitled cause on the 8th day of March, 1933, does hereby appeal from said decree to the Circuit Court of Appeals for the Second Circuit for the reasons set forth in the assignment of errors filed herewith, and he prays that his appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Second Circuit, under the rules of such court in such cases made and provided.

And your petitioner further prays that, this being an action and appeal by a seaman for wages, no security or bond be required of him, as provided for by the United [fol. 168] States Code, Title 28, Sec. 837 (July 12, 1917, C. 27, Sec. 1, 40 Stat. 157; July 1, 1918, C. 113, Sec. 1; 40 Stat. 683).

Dated New York, May 15th, 1933.

John M. Scoble, Esq., Proctor for Libellant, Office & Post Office Address: 55 Liberty Street, Borough of Manhattan, City of New York.

In United States District Court

[Title omitted]

Order Allowing Appeal

On motion of John M. Scoble, Esq., proctor for libellant, it is hereby ordered that an appeal to the United States Circuit Court of Appeals, Second Circuit, from the decree heretofore filed and entered herein on or about the 8th day of March, 1933, be, and the same is hereby allowed, and that

a certified transcript of the record, testimony, exhibits, [fol. 169] stipulations, and all proceedings be forthwith transmitted to said United States Circuit Court of Appeals, Second Circuit.

It is further ordered that, this being an action by a seaman for wages, no bond on appeal be required of him.

Dated New York, May 16th, 1933.

Alfred C. Coxe, U. S. D. J.

In United States District Court

[Title omitted]

Assignment of Errors

The libellant, Livingston H. McCrea, hereby assigns errors in the rulings and proceedings of the United States District Court, Southern District of New York herein, upon which he will rely upon his prosecution of the appeal in the above entitled cause from the decree made by this Honorable Court on the 8th day of March, 1933.

[fol. 170] 1. The District Court erred in refusing to find that the Master was required to pay to the libellant one month's wages over and above the wages due at the time of his discharge, and to provide him with adequate employment on board some other vessel, or passage on board some other vessel bound to the port from which the libellant originally shipped, or to the most convenient port of entry in the United States, or to a port agreed upon by the libellant.

2. The District Court erred in refusing to find that the Master was required to pay to the libellant one month's wages over and above the wages due at the time of his discharge, and to provide him with adequate employment on board some other vessel, or passage on board some other vessel bound to the port from which the libellant originally shipped, or to the most convenient port of entry in the United States, or to a port agreed upon by the libellant, in accordance with the provisions of R. S. 4583 (46 U. S. C. A. 685).

3. The District Court erred in finding that the Master was not required to pay to the libellant one month's wages

over and above the wages due at the time of his discharge, and to provide him with adequate employment on board some other vessel, or passage on board some other vessel bound to the port from which the libellant originally shipped, or to the most convenient port of entry in the United States, or to a port agreed upon by the libellant, in accordance with the provisions of R. S. 4583 (46 U. S. C. A. 685).

[fol. 171] 4. The District Court erred in refusing to find that R. S. 4583 (46 U. S. C. A. 685) applied to complaints by seamen of violation of Sec. 2 of the Seamen's Act, (Mar. 4, 1915, C. 153, Sec. 2; 38 Stat. 1164; 46 U. S. C. A. Sec. 673).

5. The District Court erred in refusing to find that the Master of the Steamship "American Shipper," having failed to comply with Sec. 2 of the Seamen's Act (38 Stat. 1164; 46 U. S. C. A. Sec. 673), was required to pay to the libellant one month's wages over and above the wages due at the time of his discharge, and to provide him with adequate employment on board some other vessel, or passage on board some other vessel bound to the port from which the libellant originally shipped, or to the most convenient port of entry in the United States, or to a port agreed upon by the libellant, in accordance with the provisions of R. S. 4583 (46 U. S. C. A. 685).

6. The District Court erred in finding that the exclusive remedy of the libellant, for the violation of Sec. 2 of the Seamen's Act, (Mar. 4, 1915, C. 153, Sec. 2; 38 Stat. 1164; 46 U. S. C. A. 673) by the Master, was his discharge from the vessel and the receipt of wages earned.

7. The District Court erred in refusing to find that his discharge from the vessel and the receipt of wages earned was not the exclusive remedy of the libellant for the violation of Sec. 2 of the Seamen's Act (38 Stat. 1164; 46 U. S. C. A. 673) by the Master.

[fol. 172] 8. The District Court erred in refusing to find that the libellant was entitled to one month's wages over and above the wages due at the time of his discharge, and adequate employment on board some other vessel, or passage on board some other vessel bound to port from which the libellant originally shipped, or to the most convenient port of entry in the United States, or to a port agreed upon

by the libellant, in accordance with the provisions of R. S. 4583 (46 U. S. C. A. 685).

9. The District Court erred in finding that the libellant was not entitled to one month's wages over and above the wages due at the time of his discharge, and adequate employment on board some other vessel, or passage on board some other vessel bound to the port from which the libellant originally shipped, or to the most convenient port of entry in the United States, or to a port agreed upon by the libellant, in accordance with the provisions of R. S. 4583 (46 U. S. C. A. 685).

10. The District Court erred in finding that the compensation and relief, provided for in Sec. 2 of the Seamen's Act of March 14, 1915 (46 U. S. C. A. 673), is the only and exclusive relief for the violation of said statute.

11. The District Court erred in finding that the compensation and relief, provided by R. S. 4529 (Dec. 21, 1898, C. 28, Sec. 4, 30 Stat. 756; Mar. 4, 1915, C. 153, Sec. 3, 38 Stat. 1164; 46 U. S. C. A. 596), is penal.

[fol. 173] 12. The District Court erred in finding that the compensation and relief, provided by R. S. 4529 (Dec. 21, 1898, C. 28, Sec. 4, 30 Stat. 756; Mar. 4, 1915, C. 153, Sec. 3, 38 Stat. 1164; 46 U. S. C. A. 596), is a penalty.

13. The District Court erred in refusing to find that the compensation and relief, provided for in R. S. 4529 (Dec. 21, 1898, C. 28, Sec. 4, 30 Stat. 756; Mar. 4, 1915, C. 153, Sec. 3, 38 Stat. 1164; 46 U. S. C. A. 596), is not penal.

14. The District Court erred in refusing to find that the compensation and relief, provided for in R. S. 4529 (Dec. 21, 1898, C. 28, Sec. 4, 30 Stat. 756; Mar. 4, 1915, C. 153, Sec. 3, 38 Stat. 1164; 46 U. S. C. A. 596), is not a penalty.

15. The District Court erred in refusing to find that the compensation and relief, provided for in R. S. 4529 (Dec. 21, 1898, C. 28, Sec. 4, 30 Stat. 756; Mar. 4, 1915, C. 153, Sec. 3, 38 Stat. 1164; 46 U. S. C. A. 596), is remedial.

16. The District Court erred in finding that the compensation and relief, equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages, as pro-

vided for by R. S. 4529 (46 U. S. C. A. 596), are not wages or compensation.

17. The District Court erred in refusing to find that the compensation and relief, equal to two days' pay for each [fol. 174] and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages, as provided for by R. S. 4529 (46 U. S. C. A. 596), are wages or compensation.

18. The District Court erred in finding that the respondent, the United States of America, is not liable to the libellant for a sum equal to two days' pay for each and every day during which payment to him is delayed beyond the respective periods, as provided for in R. S. 4529 (46 U. S. C. A. 596).

19. The District Court erred in refusing to find that the libellant was entitled to recover from the respondent, the United States of America, the relief provided for in R. S. 4529 (46 U. S. C. A. 596).

20. The District Court erred in refusing to find that the libellant was entitled to recover from the respondent, the United States of America, from the time of his discharge, or four days thereafter, a sum equal to two days' pay for each and every day during which payment to him was delayed beyond the respective periods, to the date of the entry of the decree herein.

21. The District Court erred in refusing to find that the libellant was entitled to recover from the respondent, the United States of America, from the time of his discharge, [fol. 175] or four days thereafter, a sum equal to two days' pay for each and every day during which payment to him was delayed beyond the respective periods, to the date of the entry of the decree herein, in accordance with the provisions of R. S. 4529 (46 U. S. C. A. 596).

22. The District Court erred in refusing to find that the respondent, the United States of America, was required to pay to the libellant, from the time of his discharge, or four days thereafter, a sum equal to two days' pay for each and every day during which payment to him was delayed beyond the respective periods, to the date of the entry of the decree herein, in accordance with the provisions of R. S. 4529 (46 U. S. C. A. 596).

23. The District Court erred in finding that the relief, provided for in R. S. 4529 (46 U. S. C. A. 596), is in the nature of a penalty or punishment and cannot be recovered from the respondent, the United States of America.

24. The District Court erred in refusing to find that the relief, provided for in R. S. 4529 (46 U. S. C. A. 596), was embraced in the contract or shipping articles entered into by the libellant.

25. The District Court erred in refusing to find that the compensation and relief, provided for in R. S. 4529 (46 U. S. C. A. 596), of a sum equal to two days' pay for each and every day during which payment of wages to the libellant [fol.176] is delayed beyond the respective periods, is compensation or wages.

26. The District Court erred in finding that the compensation and relief, provided for in R. S. 4529 (46 U. S. C. A. 596), of a sum equal to two days' pay for each and every day during which payment of wages to the libellant is delayed beyond the respective periods, is not compensation or wages.

27. The District Court erred in refusing to find that R. S. 4529 (46 U. S. C. A. 596) furnished a clear and well defined rule of damages between the libellant and the Master of the Steamship "American Shipper" for a breach of contract.

28. The District Court erred in finding that R. S. 4529 (46 U. S. C. A. 596) did not furnish a clear and well defined rule of damages between the libellant and the Master of the Steamship "American Shipper" for a breach of contract.

29. The District Court erred in refusing to find that R. S. 4529 (46 U. S. C. A. 596) provided a reasonable rule of compensation for breach of contract.

30. The District Court erred in refusing to find that, under the Suits in Admiralty Act, (Mar. 9, 1920, C. 95; 41 Stat. 525), and especially sections 1, 2, 3 and 6 thereof, (46 U. S. C. A. 741, 742, 743, and 746), the respondent, the [fol. 177] United States of America, waived any right or immunity it might claim for any liability under R. S. 4529 (46 U. S. C. A. 596).

31. The District Court erred in refusing to find that, under the Suits in Admiralty Act, (Mar. 9, 1920, C. 95; 41 Stat. 525), and especially sections 1, 2, 3, and 6 thereof, (46 U. S.

C. A. 741, 742, 743, and 746), the respondent, the United States of America, waived any immunity from liability and consented to be sued in any admiralty proceeding in which a private owner would be liable, providing the vessel through which the liability arose was operated as a merchant vessel.

32. The District Court erred in refusing to find that, under the Suits in Admiralty Act, (Mar. 9, 1920, C. 95: 41 Stat. 525), and especially sections 1, 2, 3, and 6 thereof, (46 U. S. C. A. 741, 742, 743, and 746), the respondent, the United States of America, took upon itself the same obligation that is imposed upon others in the business of operating merchant vessels by the statutes of the United States or otherwise.

33. The District Court erred in refusing to find that, under the Suits in Admiralty Act, (Mar. 9, 1920, C. 95: 41 Stat. 525), and especially sections 1, 2, 3, and 6 thereof, (46 U. S. C. A. 741, 742, 743, and 746), there was imposed upon the respondent, the United States of America, the same in personam liability as that of any other owner of a merchant vessel.

[fol. 178] 34. The District Court erred in refusing to find that, under the Suits in Admiralty Act, (Mar. 9, 1920, C. 95: 41 Stat. 525), and especially sections 1, 2, 3, and 6 thereof, (46 U. S. C. A. 741, 742, 743, and 746), there was imposed upon the respondent, the United States of America, the same liability in a proceeding in admiralty as that of any other owner of a merchant vessel.

35. The District Court erred in refusing to find that, under the Suits in Admiralty Act, (Mar. 9, 1920, C. 95: 41 Stat. 525), and especially sections 1, 2, 3, and 6 thereof, (46 U. S. C. A. 741, 742, 743, and 746), the respondent, the United States of America, consented that the same in personam liability be imposed upon it as upon any other owner of a merchant vessel.

36. The District Court erred in refusing to find that, under the Suits in Admiralty Act, (Mar. 9, 1920, C. 95: 41 Stat. 525), and especially sections 1, 2, 3, and 6 thereof, (46 U. S. C. A. 741, 742, 743, and 746), the respondent, the United

States of America, consented that the same liability in a proceeding in admiralty be imposed upon it as upon any other owner of a merchant vessel.

37. The District Court erred in refusing to find that in this proceeding there is no attempt to prosecute the United States of America or its agents criminally.

38. The District Court erred in refusing to find that the respondent having admitted in its answer that the action [fol. 179] was one for wages and was within the admiralty and marine jurisdiction of the Federal Courts, and having made no motion to amend its answer, it was not entitled to raise the affirmative defense that the statutes, under which the action was brought, did not apply to the respondent.

39. The District Court erred in refusing to find that the libellant was entitled to one month's additional wages and the amount of expenses incurred by the libellant in securing transportation back to the United States, and also to two days' pay for each of the days the wages due the libellant were not paid to him from the time they were demanded or four days thereafter.

Wherefore, the libellant prays that said Decree be reversed, except as to that part which finds that the libellant was entitled to his discharge, the wages earned, and compensation for loss of clothing and effects, and that said District Court for the Southern District of New York be ordered to enter a Decree reversing the decision of said Court in said cause.

John M. Scoble, Esq., Proctor for Libellant, Office & Post Office Address: 55 Liberty Street, Borough of Manhattan, City of New York.

[fol. 180] Citation in usual form, filed May 18, 1933, omitted in printing

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[fol. 181] In United States District Court, Southern District of New York

[Title omitted]

Notice of Motion to Amend Decree

Sir: Please take notice that upon the attached affidavit of William E. Collins, verified July 5, 1933, the respondent

will move before Hon. John C. Knox, District Judge, at his Chambers in the Woolworth Building, 233 Broadway, New York City, on the 18th day of July, 1933, at 4:30 P. M., for an order in the form hereto attached, amending and resettling the final decree entered herein on March 8, 1933, as set forth in the attached proposed order, and for such other and further relief as to the Court may seem proper.

Dated New York, N. Y., July 15, 1933.

Yours, etc., George Z. Medalie, United States Attorney, Proctor for Respondent, Office & P. O. Address: 45 Broadway, Borough of Manhattan, New York City.

[fol. 182] To John M. Scoble, Esq., Proctor for Libellant, 55 Liberty Street, New York City.

At a Stated Term of the United States District Court for the Southern District of New York, Held in the Court-Rooms Thereof, in the Woolworth Building, Borough of Manhattan, City of New York, on the — Day of July, 1933

A 99-118

Livingston H. McCrea, Libellant,

against

United States of America, as Owner of the Steamship American Shipper, Her Engines, Tackle, Apparatus, etc., Respondent.

Present: Honorable John C. Knox, District Judge.

Proposed Order Amending Final Decree, Attached to Moving Papers

Upon the attached affidavit of William E. Collins, Special Assistant to the United States Attorney, verified the 5th day of July, 1933, upon the subjoined consent of John M. [fol. 183] Scoble, Esq., proctor for libellant, and upon all the proceedings heretofore had herein, it is on motion of George Z. Medalie, United States Attorney,

Ordered that the final decree entered herein on the 8th day of March, 1933, be and the same hereby is amended and resettled so as to read as follows:

"At a Stated Term of the United States District Court for the Southern District of New York, Held in the Court Rooms Thereof, in the Woolworth Building, Borough of Manhattan, City of New York, on the 8th Day of March, 1933.

A 99-118

Livingston H. McCrea, Libellant,

against

United States of America, as Owner of the Steamship American Shipper, Her Engines, Tackle, Apparatus, etc., Respondent.

Present: Honorable John C. Knox, District Judge.

The above entitled cause having come on to be heard upon the pleadings, proceedings and proofs herein filed on behalf of the above parties; and having been argued by their respective advocates; and after due proceedings had; on motion of John M. Scoble, Esq., proctor for the libellant; [fol. 184] and due deliberation having been had, it is hereby

Ordered, adjudged and decreed, as follows:

That the libellant, Livingston H. McCrea, recover of and from the United States of America, respondent herein, the sum of $28.95, constituting the wages due the libellant at the time of the demand therefor, to-wit, the 26th day of February, 1928; and that libellant recover in addition the further sum of $40.00 for loss of clothing and effects, making a total sum of $68.95, with interest thereon from the 26th day of February, 1928 to the date hereof, amounting to $21.37 together with libellant's costs as taxed, in the amount of $42.50, amounting in all to the sum of $132.82, with interest thereon at 4% until paid; and it is further

Ordered that the final decree in favor of libellant, entered herein on the 15th day of August, 1932, be and the same hereby is in all respects vacated and set aside.

Jno. C. Knox, U. S. D. J."

[fol. 185] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF WILLIAM E. COLLINS, IN SUPPORT OF MOTION

STATE OF NEW YORK,
County of New York, ss:

William E. Collins, being duly sworn, deposes and says:

I am Special Assistant to the United States Attorney and have charge of the above entitled case, with the proceedings in which I am familiar.

Pursuant to opinion of Hon. John C. Knox, District Judge, rendered on July 26, 1932, recovery was granted to libellant for certain wages alleged to have been wrongfully withheld, together with the penalty of two days' pay for each day during which payment of wages was delayed, pursuant to Section 3 of the Seaman's Act (46 U. S. C. A., Sec. 596). In accordance therewith, a decree in favor of the libellant was entered on August 15, 1932, signed by Judge Knox, in favor [fol. 186] of the libellant and against the respondent, in the amount of $6,456.83, with interest thereon @ 4% per annum until paid.

Thereafter, upon the suggestion of counsel for the respondent, that the United States of America is not subject to the imposition of the penalty provided in the aforesaid statute, the Court granted a reargument, and upon such reargument held, in a supplemental opinion dated February 10, 1933, that the United States was not subject to such penalty. In accordance with said supplemental opinion, a decree was entered herein on the 8th day of March, 1933, in favor of libellant and against respondent, in the amount of $132.82 with interest thereon @ 4% per annum until paid.

In connection with the appeal taken by libellant from the last mentioned decree, my attention has been called to the fact that said decree entered March 8, 1933 does not vacate or set aside, or in any way refer to the previous decree of August 15, 1932. This is due to inadvertence, as at the time the second decree was prepared it was my impression that no decree had been entered on the Court's first opinion rendered before the reargument.

It is therefore respectfully requested that the annexed order be entered herein amending the said decree of March 8, 1933 so as to provide, as set forth in the attached order, [fol. 187] that the decree entered herein on August 15, 1932 be in all respects vacated and set aside.

William E. Collins.

Sworn to before me this 5th day of July, 1933. Albert L. Fager, Notary Public, New York County No. 2. New York Co. Register's No. 4-F-301. My Commission expires March 30, 1934. (Seal.)

In United States District Court

[Title omitted]

Affidavit of John M. Scoble, in Opposition to Motion—Filed July 19, 1933

State of New York,
County of New York, ss:

John M. Scoble, being duly sworn, says: That he is the proctor for the libellant in the above entitled action. [fol. 188] That on or about the twelfth day of August, 1932, a decree was duly made in the said action, which read as follows:

"At a Stated Term of the United States District Court for the Southern District of New York, Held at the Court Rooms Thereof in the Woolworth Building, Borough of Manhattan, City of New York, on the 12th Day of August, 1932.

A 99-118

Livingston H. McCrea, Libellant,
against

United States of America, as owner of the Steamship 'American Shipper,' Her Engines, Tackle, Apparatus, etc., Respondent

Present: Honorable John C. Knox, District Judge.

The above entitled cause having come on to be heard upon the pleadings, proceedings and proofs herein filed on behalf of the above parties; and having been argued by their respective advocates; and after due proceedings had; on mo-

tion of John M. Scoble, Esq., proctor for the libellant; and due deliberation having been had, it is hereby

Ordered, adjudged, and decreed, as follows:

[fol. 189] That the libellant, Livingston H. McCrea, recover of and from the United States of America, respondent herein, the sum of $28.95, constituting the wages due the libellant at the time of the demand, to wit, the 26th day of February, 1928; and that libellant recover in addition, two days' pay for one, namely, at the rate of $4.33 per day or $130.00 per month, from the 11th day of July, 1928, the date of the commencement of this suit, to the 12th day of August, 1932, the date of the entry of this decree, to wit, the sum of $6,374.33, together with the sum of $42.50 libellant's costs as taxed, together with the further sum of $40.00 for loss of clothing and effects, amounting in all to the sum of $6,456.83, with interest thereon at 4% per annum until paid.

Jno. C. Knox, CW., United States District Judge.

Filed August 15, 1932."

That the said decree was duly filed and entered in the office of the Clerk of this Court on or about the 15th day of August, 1932.

That on or about the thirteenth day of August, 1932, the proctor for the respondent herein made an application to the Court for a rehearing in the said case. In the said application for a rehearing the respondent asked that the signing of the decree be delayed.

[fol. 190] That the application for the said rehearing consisted only of a letter to the Court, a copy of which was sent to the deponent. That the said letter read as follows:

"August 13, 1932.

Docket No. A99-118

LIVINGSTON MCCREA,

v.

UNITED STATES—S. S. 'American Shipper'

Hon. John C. Knox, United States District Judge, Woolworth Building, New York City.

MY DEAR JUDGE KNOX: Since reading your Honor's opinion in the above entitled case, in which a decree has been

presented awarding to the libellant penalties against the United States for withholding wages, under the provisions of 46 U. S. C. A. 596, my attention has been called to the decision of Judge Goddard in Corrigan v. United States, 298 Fed. 610, 613, in which it was squarely held that under the same statute penalties could not be imposed against the United States. The decision cites the Supreme Court case, to the same effect, of Missouri Pacific R. R. Co. and Director General v. Ault, 256 U. S. 554, 563.

[fol. 191] I am unable to find any decisions to the contrary.

It seems to me, therefore, that a motion for rehearing should be granted in this case. Unfortunately I had planned to leave on a vacation on the 17th, and I understand that Mr. Scoble, proctor for the libellant, is now away, and would suggest, if agreeable to your Honor, that the signing of any decree be deferred at this time so that a motion for reargument can be made at a later date convenient to the Court and counsel.

I am sending a copy of this letter to Mr. Scoble.

Respectfully, William E. Collins, Special Assistant to the United States Attorney.

CC to John M. Scoble, Esq., 55 Liberty Street, New York City.

WEC:MG"

In the application, the respondent stated "that a motion for rehearing should be granted," and suggested "that the signing of any decree be deferred" * * * "so that a motion for reargument can be made at a later date."

That on or about the thirtieth day of August, 1932, the Court granted a rehearing in the said suit, saying:

[fol. 192] "UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

A 99-118

LIVINGSTON H. MCCREA, Libellant,

against

UNITED STATES OF AMERICA, as Owner of the Steamship 'American Shipper,' Her Engines, Tackle, Apparatus, etc., Respondent

Memorandum

In view of the decision in Corrigan vs. United States, 298 Fed. 610, which has now been brought to my attention for the first time, I will grant a rehearing in the above entitled suit. Counsel for the parties may arrange a time for rehearing by communicating with my secretary.

August 30, 1932.

Jno. C. Knox, U. S. D. J."

No petition or motion to vacate or amend or modify the decree of August 12, 1932, was ever made.

In the opinion of February, 1933, the Honorable Court said:

[fol. 193] "By memorandum opinion, dated August 30, 1932, a reargument of this case was granted."

And further:

"The decision previously rendered is modified so as to eliminate libellant's recovery of two days' pay for each day since the date upon which he was entitled to his discharge."

In the proposed order herein it is stated that it is granted on the consent of the proctor for the libellant. This is not so. If the order be granted, it should recite that the libellant appeared and opposed the motion.

John M. Scoble.

Subscribed and sworn to before me this 18th day of July, 1933. Walter B. Brady, Notary Public, Kings County. Kings Co. Clks. No. 787, Reg. No. 5380. N. Y. Co. Clks. No. 837, Reg. No. 5B509. Bronx Co. Clks. No. 40, Reg. No. 160B35. Commission expires March 30, 1935.

[File endorsement omitted.]

[fol. 194] IN UNITED STATES DISTRICT COURT

A 99-118

LIVINGSTON H. MCCREA, Libellant,

against

UNITED STATES OF AMERICA, as Owner of the Steamship "American Shipper," Her Engines, Tackle, Apparatus, etc., Respondent

Present: Honorable John C. Knox, District Judge.

ORDER AMENDING FINAL DECREE—July 18, 1933

Upon the attached affidavit of William E. Collins, Special Assistant to the United States Attorney, verified the 5th day of July, 1933, upon the affidavit of John M. Scoble of July 18, 1933, and over the opposition of John M. Scoble, Esq., proctor for libellant, and upon all the proceedings heretofore had herein, it is on motion of George Z. Medalie, United States Attorney,

Ordered that the final decree entered herein on the 8th day of March, 1933, be and the same hereby is amended and resettled so as to read as follows:

[fol. 195] "AT A STATED TERM OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTICT OF NEW YORK, HELD IN THE COURT ROOMS THEREOF, IN THE WOOLWORTH BUILDING, BOROUGH OF MANHATTAN, CITY OF NEW YORK, ON THE 8TH DAY OF MARCH, 1933

A 99-118

LIVINGSTON H. MCCREA, Libellant,

against

UNITED STATES OF AMERICA, as Owner of the Steamship "American Shipper," Her Engines, Tackle, Apparatus, etc., Respondent

Present: Honorable John C. Knox, District Judge.

The above entitled cause having come on to be heard upon the pleadings, proceedings and proofs herein filed on be-

half of the above parties; and having been argued by their respective advocates; and after due proceedings had; on motion of John M. Scoble, Esq., proctor for the libellant; and due deliberation having been had, it is hereby

Ordered, adjudged and decreed, as follows:

That the libellant, Livingston H. McCrea, recover of and from the United States of America, respondent herein, the [fol. 196] sum of $28.95, constituting the wages due the libellant at the time of the demand therefor, to-wit, the 26th day of February, 1928; and that libellant recover in addition the further sum of $40.00 for loss of clothing and effects, making the total sum of $68.95, with interest thereon from the 26th day of February, 1928, to the date hereof, amounting to $21.37 together with libellant's costs as taxed, in the amount of $42.50, amounting in all to the sum of $132.82, with interest thereon at 4% until paid; and it is further

Ordered that the final decree in favor of libellant, entered herein on the 15th day of August, 1932, be and the same hereby is in all respects vacated and set aside.

Jno. C. Knox, U. S. D. J."

Dated New York, N. Y., July 18, 1933.

Filed July 19, 1933.

[fol. 197] In United States District Court

[Title omitted]

Notice of Appeal—Filed August 10, 1933

Please take notice that Livingston H. McCrea, libellant in the above entitled action, hereby appeals to the United States Circuit Court of Appeals, for the Second Circuit, from each and every part of the amended decree or order herein, dated the 18th day of July, 1933, and entered on the 19th day of July, 1933, in the office of the Clerk of the United States District Court, Southern District of New York.

That the libellant also appeals from the memorandum decision of said District Court, dated the 30th day of August,

1932, granting the motion for the reargument of said case.
Dated New York, August 7th, 1933.

Yours, etc., John M. Scoble, Proctor for Libellant, Office & P. O. Address: 55 Liberty Street, Borough of Manhattan, City of New York.

[fol. 198] To George Z. Medalie, Esq., United States Attorney, Proctor for Respondent, 45 Broadway, New York City.

[File endorsement omitted.]

In United States District Court, Southern District of New York

[Title omitted]

Assignments of Error—Filed August 10, 1933

The libellant, Livingston H. McCrea, hereby assigns errors in the rulings and proceedings of the United States District Court, Southern District of New York, herein, upon which he will rely upon his prosecution of the appeal in the above entitled cause from the amended decree or order made by this Honorable Court on the 18th day of July, 1933, and entered on the 19th day of July, 1933.

[fol. 199] 1. The District Court erred in refusing to find that the Master was required to pay to the libellant one month's wages over and above the wages due at the time of his discharge, and to provide him with adequate employment on board some other vessel, or passage on board some other vessel bound to the port from which the libellant originally shipped, or to the most convenient port of entry in the United States, or to a port agreed upon by the libellant.

2. The District Court erred in refusing to find that the Master was required to pay to the libellant one month's wages over and above the wages due at the time of his discharge, and to provide him with adequate employment on board some other vessel, or passage on board some other vessel bound to the port from which the libellant originally shipped, or to the most convenient port of entry in the

United States, or to a port agreed upon by the libellant, in accordance with the provisions of R. S. 4583 (46 U. S. C. A. 685).

3. The District Court erred in finding that the Master was not required to pay to the libellant one month's wages over and above the wages due at the time of his discharge, and to provide him with adequate employment on board some other vessel, or passage on board some other vessel bound to the port from which the libellant originally shipped, or to the most convenient port of entry in the United States, or to a port agreed upon by the libellant, in accordance with the provisions of R. S. 4583 (46 U. S. C. A. 685).

[fol. 200] 4. The District Court erred in refusing to find that R. S. 4583 (46 U. S. C. A. 685) applied to complaints by seamen of violation of Sec. 2 of the Seamen's Act (Mar. 4, 1915, C. 153, Sec. 2; 38 Stat. 1164; 46 U. S. C. A. Sec. 673).

5. The District Court erred in refusing to find that the Master of the Steamship "American Shipper," having failed to comply with Sec. 2 of the Seamen's Act (38 Stat. 1164; 46 U. S. C. A. Sec. 673), was required to pay to the libellant one month's wages over and above the wages due at the time of his discharge, and to provide him with adequate employment on board some other vessel, or passage on board some other vessel bound to the port from which the libellant originally shipped, or to the most convenient port of entry in the United States, or to a port agreed upon by the libellant, in accordance with the provisions of R. S. 4583 (46 U. S. C. A. 685).

6. The District Court erred in finding that the exclusive remedy of the libellant, for the violation of Sec. 2 of the Seamen's Act (Mar. 4, 1915, C. 153, Sec. 2; 38 Stat. 1164; 46 U. S. C. A. 673), by the Master, was his discharge from the vessel and the receipt of wages earned.

7. The District Court erred in refusing to find that his discharge from the vessel and the receipt of wages earned was not the exclusive remedy of the libellant for the violation of Sec. 2 of the Seamen's Act (38 Stat. 1164; 46 U. S. C. A. 673) by the Master.

[fol. 201] 8. The District Court erred in refusing to find that the libellant was entitled to one month's wages over and above the wages due at the time of his discharge, and adequate employment on board some other vessel, or passage on board some other vessel bound to the port from which the libellant originally shipped, or to the most convenient port of entry in the United States, or to a port agreed upon by the libellant, in accordance with the provisions of R. S. 4583 (46 U. S. C. A. 685).

9. The District Court erred in finding that the libellant was not entitled to one month's wages over and above the wages due at the time of his discharge, and adequate employment on board some other vessel, or passage on board some other vessel bound to the port from which the libellant originally shipped, or to the most convenient port of entry in the United States, or to a port agreed upon by the libellant, in accordance with the provisions of R. S. 4583 (46 U. S. C. A. 685).

10. The District Court erred in finding that the compensation and relief, provided for in Sec. 2 of the Seamen's Act of March 14, 1915 (46 U. S. C. A. 673), is the only and exclusive relief for the violation of said statute.

11. The District Court erred in finding that the compensation and relief, provided by R. S. 4529 (Dec. 21, 1898, C. 28, Sec. 4, 30 Stat. 756; Mar. 4, 1915, C. 153, Sec. 3, 38 Stat. 1164; 46 U. S. C. A. 596), is penal.

[fol. 202] 12. The District Court erred in finding that the compensation and relief, provided by R. S. 4529 (Dec. 21, 1898, C. 28, Sec. 4, 30 Stat. 756; Mar. 4, 1915, C. 153, Sec. 3, 38 Stat. 1164; 46 U. S. C. A. 596), is a penalty.

13. The District Court erred in refusing to find that the compensation and relief, provided for in R. S. 4529 (Dec. 21, 1898, C. 28, Sec. 4, 30 Stat. 756; Mar. 4, 1915, C. 153, Sec. 3, 38 Stat. 1164; 46 U. S. C. A. 596), is not penal.

14. The District Court erred in refusing to find that the compensation and relief, provided for in R. S. 4529 (Dec. 21, 1898, C. 28, Sec. 4, 30 Stat. 756; Mar. 4, 1915, C. 153, Sec. 3, 38 Stat. 1164; 46 U. S. C. A. 596), is not a penalty.

15. The District Court erred in refusing to find that the compensation and relief, provided for in R. S. 4529 (Dec.

21, 1898, C. 28, Sec. 4, 30 Stat. 756; Mar. 4, 1915, C. 153, Sec. 3, 38 Stat. 1164; 46 U. S. C. A. 596), is remedial.

16. The District Court erred in finding that the compensation and relief, equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages, as provided for by R. S. 4529 (46 U. S. C. A. 596), are not wages or compensation.

17. The District Court erred in refusing to find that the compensation and relief, equal to two days' pay for each [fol. 203] and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages, as provided for by R. S. 4529 (46 U. S. C. A. 596), are wages or compensation.

18. The District Court erred in finding that the respondent, the United States of America, is not liable to the libellant for a sum equal to two days' pay for each and every day during which payment to him is delayed beyond the respective periods, as provided for in R. S. 4529 (46 U. S. C. A. 596).

19. The District Court erred in refusing to find that the libellant was entitled to recover from the respondent, the United States of America, the relief provided for in R. S. 4529 (46 U. S. C. A. 596).

20. The District Court erred in refusing to find that the libellant was entitled to recover from the respondent, the United States of America, from the time of his discharge, or four days thereafter, a sum equal to two days' pay for each and every day during which payment to him was delayed beyond the respective periods, to the date of the entry of the decree herein.

21. The District Court erred in refusing to find that the libellant was entitled to recover from the respondent, the United States of America, from the time of his discharge, [fol. 204] or four days thereafter, a sum equal to two days' pay for each and every day during which payment to him was delayed beyond the respective periods, to the date of the entry of the decree herein, in accordance with the provisions of R. S. 4529 (46 U. S. C. A. 596).

22. The District Court erred in refusing to find that the respondent, the United States of America, was required to

pay to the libellant, from the time of his discharge, or four days thereafter, a sum equal to two days' pay for each and every day during which payment to him was delayed beyond the respective periods, to the date of the entry of the decree herein, in accordance with the provisions of R. S. 4529 (46 U. S. C. A. 596).

23. The District Court erred in finding that the relief, provided for in R. S. 4529 (46 U. S. C. A. 596), is in the nature of a penalty or punishment and cannot be recovered from the respondent, the United States of America.

24. The District Court erred in refusing to find that the relief, provided for in R. S. 4529 (46 U. S. C. A. 596), was embraced in the contract or shipping articles entered into by the libellant.

25. The District Court erred in refusing to find that the compensation and relief, provided for in R. S. 4529 (46 U. S. C. A. 596), of a sum equal to two days' pay for each and every day during which payment of wages to the libel-[fol. 205] lant is delayed beyond the respective periods, is compensation or wages.

26. The District Court erred in finding that the compensation and relief, provided for in R. S. 4529 (46 U. S. C. A. 596), of a sum equal to two days' pay for each and every day during which payment of wages to the libellant is delayed beyond the respective periods, is not compensation or wages.

27. The District Court erred in refusing to find that R. S. 4529 (46 U. S. C. A. 596) furnished a clear and well defined rule of damages between the libellant and the Master of the Steamship "American Shipper" for a breach of contract.

28. The District Court erred in finding that R. S. 4529 (46 U. S. C. A. 596) did not furnish a clear and well defined rule of damages between the libellant and the Master of the Steamship "American Shipper" for a breach of contract.

29. The District Court erred in refusing to find that R. S. 4529 (46 U. S. C. A. 596) provided a reasonable rule of compensation for breach of contract.

30. The District Court erred in refusing to find that, under the Suits in Admiralty Act, (Mar. 9, 1920, C. 95; 41

Stat. 525), and especially sections 1, 2, 3 and 6 thereof, (46 U. S. C. A. 741, 742, 743, and 746), the respondent, the [fol. 206] United States of America, waived any right or immunity it might claim for any liability under R. S. 4529 (46 U. S. C. A. 596).

31. The District Court erred in refusing to find that, under the Suits in Admiralty Act (Mar. 9, 1920, C. 95; 41 Stat. 525), and especially sections 1, 2, 3, and 6 thereof (46 U. S. C. A. 741, 742, 743, and 746), the respondent, the United States of America, waived any immunity from liability and consented to be sued in any admiralty proceeding in which a private owner would be liable, providing the vessel through which the liability arose was operated as a merchant vessel.

32. The District Court erred in refusing to find that, under the Suits in Admiralty Act (Mar. 9, 1920, C. 95; 41 Stat. 525), and especially sections 1, 2, 3, and 6 thereof (46 U. S. C. A. 741, 742, 743, and 746), the respondent, the United States of America, took upon itself the same obligation that is imposed upon others in the business of operating merchant vessels by the statutes of the United States or otherwise.

33. The District Court erred in refusing to find that, under the Suits in Admiralty Act (Mar. 9, 1920, C. 95; 41 Stat. 525), and especially sections 1, 2, 3, and 6 thereof (46 U. S. C. A. 741, 742, 743, and 746), there was imposed upon the respondent, the United States of America, the same in personam liability as that of any other owner of a merchant vessel.

[fol. 207] 34. The District Court erred in refusing to find that, under the Suits in Admiralty Act (Mar. 9, 1920, C. 95; 41 Stat. 525), and especially sections 1, 2, 3, and 6 thereof (46 U. S. C. A. 741, 742, 743, and 746), there was imposed upon the respondent, the United States of America, the same liability in a proceeding in admiralty as that of any other owner of a merchant vessel.

35. The District Court erred in refusing to find that, under the Suits in Admiralty Act (Mar. 9, 1920, C. 95; Stat. 525), and especially sections 1, 2, 3, and 6 thereof (46 U. S. C. A. 741, 742, 743, and 746), the respondent, the United States of America, consented that the same in per-

sonam liability be imposed upon it as upon any other owner of a merchant vessel.

36. The District Court erred in refusing to find that, under the Suits in Admiralty Act (Mar. 9, 1920, C. 95; 41 Stat. 525), and especially sections 1. 2, 3, and 6 thereof (46 U. S. C. A. 741, 742, 743, and 746), the respondent, the United States of America, consented that the same liability in a proceeding in admiralty be imposed upon it as upon any other owner of a merchant vessel.

37. The District Court erred in refusing to find that in this proceeding there is no attempt to prosecute the United States of America or its agents criminally.

38 The District Court erred in refusing to find that the respondent having admitted in its answer that the action was one for wages and was within the admiralty and marine [fol. 208] jurisdiction of the Federal Courts, and having made no motion to amend its answer, it was not entitled to raise the affirmative defense that the statutes, under which the action was brought, did not apply to the respondent.

39. The District Court erred in refusing to find that the libellant was entitled to one month's additional wages and the amount of expenses incurred by the libellant in securing transportation back to the United States, and also to two days' pay for each of the days the wages due the libellant were not paid to him from the time they were demanded or four days thereafter.

40. The District Court erred in granting the reargument of the case in its memorandum decision of August 30th, 1932, a final degree therein having already been made August 12th, 1932, and entered August 15th, 1932.

41. The District Court erred in making and entering the judgment or decree, dated March 8th, 1933 (or March 9th, 1933), there being a final decree in the matter made the 12th day of August, 1932, and entered the 15th day of August, 1932.

42. The District Court erred in granting the motion to vacate the final judgment or decree, made August 12th, 1932, and entered August 15th, 1932.

[fol. 209] 43. The District Court erred in not denying the motion to vacate the final judgment or decree, made August 12th, 1932, and entered August 15th, 1932.

44. The District Court erred in making and entering the amended decree or order, dated the 18th day of July, 1933, amending the decree in this case of March 8th, 1933 (or March 9th, 1933), ordering and directing that the final decree, made the 12th day of August, 1932, and entered the 15th day of August, 1932, be vacated and set aside.

Wherefore, the libellant prays that said amended decree or order be reversed and that said District Court for the Southern District of New York be ordered to enter a decree reversing the decision of said Court in said cause.

John M. Scoble, Proctor for Libellant-Appellant, Office & P. O. Address: 55 Liberty Street, Borough of Manhattan, City of New York.

[File endorsement omitted.]

[fol. 210] In United States District Court, Southern District of New York

[Title omitted]

Petition for Appeal—Filed Aug. 10, 1933

To the Honorable Judges of the United States District Court for the Southern District of New York:

The above named libellant, Livingston H. McCrea, feeling aggrieved by the amended decree or order made and rendered in the above entitled cause on the 18th day of July, 1933, and entered on the 19th day of July, 1933, does hereby appeal from said amended decree or order to the Circuit Court of Appeals for the Second Circuit for the reasons set forth in the assignments of error filed herewith, and he prays that his appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said amended decree or order was based, duly authenticated, be sent to the United States Circuit Court of Appeals for

the Second Circuit, under the rules of such court in such cases made and provided.

And your petitioner further prays that, this being an action and appeal by a seaman for wages, no security or bond [fol. 211] be required of him, as provided for by the United States Code, Title 28, Sec. 837 (July 12, 1917, C. 27, Sec. 1, 40 Stat. 157; July 1, 1918, C. 113, Sec. 1; 40 Stat. 683).

Dated New York, August 7th, 1933.

John M. Scoble, Proctor for Libellant-Appellant, Office & P. O. Address: 55 Liberty Street, Borough of Manhattan, City of New York.

[File endorsement omitted.]

In United States District Court, Southern District of New York

[Title omitted]

Order Allowing Appeal—Filed Aug. 10, 1933

On motion of John M. Scoble, Esq., proctor for libellant, it is hereby ordered that an appeal to the United States Circuit Court of Appeals, Second Circuit, from the amended decree or order heretofore filed and entered herein on or about the 19th day of July, 1933, and from the order [fols. 212 & 213] of the District Court made the 12th day of August, 1932, and entered the 15th day of August, 1932, be, and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations, and all proceedings be forthwith transmitted to said United States Circuit Court of Appeals, Second Circuit.

It is further ordered that, this being an action by a seaman for wages, no bond on appeal be required of him.

Dated New York, August 10th, 1933.

Robert P. Patterson, U. S. D. J.

[File endorsement omitted.]

Citation in usual form, filed Aug. 16, 1933, omitted in printing.

[fol. 214] In United States District Court, Southern District of New York

[Title omitted]

Stipulation Settling Case

It is hereby stipulated and agreed by and between the proctors for the above entitled parties that the foregoing is a true and correct transcript of record of the District Court in this action as agreed upon by the parties.

Dated New York, October 11th, 1933.

John M. Scoble, Proctor for Libellant. George Z. Medalie, Proctor for Respondent.

[fol. 215] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 216] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

LIVINGSTON H. MCCREA, Libellant-Appellant,

against

UNITED STATES OF AMERICA, as Owner of the Steamship "American Shipper", Engines, Tackle, Apparatus, etc., Respondent-Appellee

Before L. Hand, Swan and Chase, Circuit Judges

In Admiralty. Appeal from a decree of the District Court for the Southern District of New York. Affirmed.

John M. Scoble, Esq., Proctor for Libellant; K. Courtenay Johnston, Esq., of Counsel.

Martin Conboy, Esq., United States Attorney; William E. Collins, Esq., Special Assistant, United States Attorney, Advocate.

CHASE, Circuit Judge:

The libellant shipped as a fireman on the S. S. American Shipper on a voyage from New York to London. The steamer left New York February 15, 1928 and arrived at London the following February 26th. It was owned by the United States and was a merchant vessel subject to the provisions of Sec. 2 of the Seamen's Act of March 4, 1915 (46 [fol. 217] U. S. C. A. Sec. 673) relating to watches; their duties; and their right to discharge.

There were thirteen seamen on the vessel and they were not, while at sea, divided as equally as that number permitted into watches and kept on duty successively as the above statute required. Instead of this, there were three watches of three men each and the remaining four were kept on day duty and not included in any watch.

This libellant had made himself somewhat familiar with the provisions of the Seamen's Act before signing on and also with the decision of the Supreme Court in O'Hara v. Luckenbach S. S. Co., 269 U. S. 364. One of his reasons for becoming a member of the crew of this ship was to take advantage of any violation of the law. He made no complaint during the voyage but after the ship docked at Lon-

don and while the captain was paying the crew about to go on shore leave, one half of their wages, demanded his discharge with full pay; additional wages for one month; and his passage home on the ground that the seamen had not been divided into equal watches. He then told the captain he was making his demand under Sec. 2 of the Seamen's Act and Sec. 4583 R. S. and refused to accept half his wages. The master told him he didn't know what these sections of the statute were about and would have to look them up and asked the libellant to meet him at the office of the American Consul in London just after noon the next day. He gave libellant the address of the American Consulate and told [fol. 218] him they would talk the matter over there. The appellant went to the Consulate the next morning and waited until half past eleven when he left after stating his complaint and being informed that he was not entitled to a discharge. He requested a written decision, and after complying with a request to put his complaint in writing, one to like effect was sent addressed to him in care of the ship. The captain, who had been busy preparing his papers for entry at the Customs House, got to the Consulate about two o'clock that day and was told that the appellant had been there and gone. He then returned to the ship where he remained most of the time it was in port but did not see the appellant again.

The appellant testified that he returned from the Consulate to the ship; knocked on the captain's door that night and again the next morning but received no answer at either time. He then asked the chief mate if the captain was aboard and the mate said he didn't know. When he asked the mate for a pass for his clothes he was told that the mate couldn't give him one and he was not allowed to take his clothes when he left the ship soon afterward without any other attempt to see the captain or leaving any information which would enable the captain to communicate with him. He did not intend to return to the ship when he left and never did return but spent about three weeks visiting relatives in England. Becoming somewhat alarmed about his status in England as an alien who had deserted his ship, he then purchased his passage on another vessel and re- [fol. 219] turned to the United States. He brought this action on July 11, 1928.

On August 15, 1932, a decree dated August 12, 1932, was entered in the District Court under which the appellant

was awarded the wages due him when he demanded them in London on February 26, 1928; the value of his clothing and effects left on the ship and twice his pay from the commencement of this action to the date of the decree. On August 13, 1932, an assistant United States Attorney wrote the judge a letter in which his attention was called to Missouri Pacific R. R. Co. and Director General v. Ault, 256 U. S. 554, 563 and to Corrigan v. United States, 298 Fed. 610, 613 on the question of the liability of the government for a penalty and a rehearing was requested. On August 30, 1932, a rehearing was granted.

On March 9, 1933, a decree was entered in which the appellant was granted recovery as in the decree of the previous August with the exception of double pay. An order allowing the appellant an appeal from this decree was signed and filed May 16, 1933. On the same day he filed an assignment of errors. Being an action by a seaman for wages, no bond was required. On July 5, 1933 the district attorney moved in the District Court for an order amending and resettling the March decree. The motion was granted and on July 18, 1933 the decree was amended by adding thereto this paragraph; "Ordered that the final decree in favor of libellant, entered herein on the 15th day of August 1932, be and the same is in all respects vacated and set aside." On August 10, 1933 an appeal was allowed in the District Court and new assignments of error were [fol. 220] filed by the libellant which, in addition to the issues previously raised, questioned the power of the District Court to enter the decree of March 1933 and to vacate the August 1932 decree by the amendment to the March decree of July 18, 1933. It is apparent that the entry of the decree of August 15th two days after the request for rehearing was made was irregular. At that time the matter of a rehearing was pending and a rehearing without restriction was granted August 30th. That action vacated the decree which had been entered. Hook v. Mercantile Trust Co. of N. Y., 95 Fed. 41. The decree afterwards entered in March 1933, superseded the decree entered the previous August. Compare, Wolff Packing Co. v. Indus. Court, 267 U. S. 552, 561. The March decree was entered when the matter was still pending in the District Court and when that court had complete jurisdiction. It became the decree of that court. After the appeal was taken from the March

decree, however, the cause was pending in this court and the District Court had no power to take any action in regard to it without our leave. Baltimore S. S. Co. v. Phillips, 9 Fed (2) 902. The amendment to the March decree, made while the appeal was pending here, will, therefore, be disregarded as a nullity.

On the merits the important issue is whether the appellant is entitled to recover double wages under The Seamen's Act, Sec. 4529 R. S. (46 U. S. C. A. 596). The government has taken no appeal. The decision of the District Court that the appellant was not entitled to any double pay was put on the ground that such requirement of the [fol. 221] statute was a penalty not recoverable from the United States.

In Vincent v. United States, 272 Fed. 889, it was held, without discussing the point here raised, that the government was bound to pay double wages to seamen. In Gerber v. Spencer, 278 Fed. 886 it was held that the statute provided for extra compensation entitled to priority in payment as are wages and in Buckley v. Oceanic S. S. Co., 5 Fed. (2) 545 it was held that the double pay was not a penalty. Moreover, in Cox v. Lykes Brothers, 237 N. Y. 376 it was held that for the purpose of determining whether the state court had jurisdiction this statute was not to be taken to provide for a penalty.

In Missouri Pacific R. R. Co. v. Ault, 256 U. S. 554, however, a statute of Arkansas, providing that if a railroad failed to pay an employee his full wages within seven days after discharge his wages should continue at the same rate until he was paid, was held to create a penalty not recoverable from the United States which had not consented to be sued for that purpose.

The statute here involved calls for the payment of double wages while the Arkansas statute was only for pay at the same rate. The penalty element is just twice as pronounced in this statute. It may well be that such a statute has the dual purpose of compensation and punishment behind it. But, in deciding whether the United States has agreed to be liable for double the pay of a seaman whenever one of its agents violates this statute, we believe the dominant purpose of the statute must control and that such purpose is punishment for the violation. In the Arkansas statute the pay for delay was called a penalty while here it is not

[fol. 222] but Justice Brandeis made it perfectly clear in his opinion in the Ault case that the name given to what does more than compensate and does punish is not decisive and double damages is given as an example of what the government has not consented to pay. Even double damages would be much less in degree on the question of punishment than the amount claimed in this case. The wages earned and due the appellant when he demanded his discharge and his pay on February 26, 1928 amounted to $28.95 and he now claims in addition to that with interest, because of the double wage provision of the statute, about $7000.00. Obviously such a sum cannot be merely just compensation for delay in paying the wages earned and we feel bound by the decision in the Ault case to take a view contrary to that which prevailed in the other cases cited in so far as they may be authority for holding that the United States is subject to the double wage provision of the Seamen's Act (46 U. S. C. A. 596).

The appellant also seeks to recover pay for one month and passage to the port at which he shipped, under Sec. 4583 R. S. (46 U. S. C. A. Sec. 685). That section of the statute applies to a seaman who is actually discharged in a foreign country by a consular officer on his complaint that the voyage is continued contrary to agreement, or that the vessel is badly provisioned or unseaworthy, or against the officers for cruel treatment. When a seaman is so discharged by a consular officer, it is the duty of the consul or consular agent after inquiry and upon being satisfied of the truth and justice of the complaint to "require the master to pay to such seaman one month's wages over and [fol. 223] above the wages due at the time of discharge, and to provide him with adequate employment on board some other vessel, or provide him with a passage on board some other vessel bound to the port from which he originally shipped, or to the most convenient port of entry in the United States, or to a port agreed to by the seaman". By its express terms the conditions precedent to its application are both a discharge in accordance with its provisions and consular action requiring the master to pay and provide. It is evident that the appellant, who deserted his ship when he failed to get favorable action from the consul in London on his complaint and was not discharged, has no cause of

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action under this statute since the conditions essential to its application have not been, and cannot be, shown.

Decree affirmed.

[fol. 223a] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Livingston H. McCrea v. U. S. A., owner of Steamship American Shipper. (Copy.) Opinion. Chase, Circuit Judge.

[fol. 224] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the court-rooms in the Post Office building in the City of New York, on the 7th day of May, one thousand nine hundred and thirty-four.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Harrie B. Chase, Circuit Judges.

LIVINGSTON H. MCCREA, Libellant-Appellant,

vs.

UNITED STATES, Respondent-Appellee

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be, and it hereby is, affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 225] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Livingston H. McCrea vs. United States. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed May 7, 1934. William Parkin, Clerk.

[fol. 226] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 225, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Livingston H. McCrea, Libellant-Appellant, against United States, Respondent-Appellee, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 8th day of May, in the year of our Lord, one thousand nine hundred and thirty-four, and of the Independence of the said United States the one hundred and fifty-eighth.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 227] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 8, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,877. U. S. Circuit Court of Appeals, Second Circuit. Term No. 249. Livingston H. McCrea, Petitioner, vs. The United States of America, as Owner of the S. S. "American Shipper," Engines, Tackle, Apparatus, etc. Petition for a writ of certiorari and exhibit thereto. Filed August 3, 1934. File No. 249, O. T., 1934.